Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1975

No. 75-1407

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

*Appellants,*

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

*Appellees.*

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

## JURISDICTIONAL STATEMENT
### For Appellants Trainor and O'Malley

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS**

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## JURISDICTIONAL STATEMENT
**For Appellants Trainor and O'Malley**

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## JURISDICTIONAL STATEMENT

Appellants James Trainor and Vivan O'Malley appeal from the final judgment of a three-judge court in the United States District Court for the Northern District of Illinois, Eastern Division. Appellants respectfully submit this Statement to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## OPINION BELOW

The opinion of the district court is reported at 405 F. Supp. 757 (N.D. Ill. 1975).The court's judgment and its opinion in this case are reprinted herein at Appendices A and B, respectively.

## JURISDICTION

Appellees brought this class action under 28 U.S.C. § 1343 (3) and (4) and 42 U.S.C. § 1983, seeking to have the district court declare invalid and enjoin the appellants from enforcing the Illinois Attachment Act, on the ground that the procedures provided for by that Act deprived appellees of their property without due process of law in violation of the fourteenth amendment to the United States Constitution. A three-judge court, convened pursuant to 28 U.S.C. §§ 2281 and 2284, entered its judgment on December 15, 1975, granting appellees the relief sought.

Appellants Trainor and O'Malley filed their Notice of Appeal in the district court on February 3, 1976, a copy of which is reprinted at Appendix C (Appellants Finley and Elrod filed a Notice of Appeal on February 10, 1976). Jurisdiction of the Supreme Court of the United States



to review this case by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of this Court to review this judgment on direct appeal:

*MTM, Inc.* v. *Baxley,* 420 U.S. 799, 43 L. Ed. 2d 636, 95 S. Ct. 1278 (1975);

*United States* v. *Georgia Public Service Commission,* 371 U.S. 285, 9 L. Ed. 2d 317, 83 S. Ct. 397 (1963).

## STATUTE INVOLVED

The Illinois Attachment Act, Illinois Revised Statutes 1973, Chapter 11, is reprinted at Appendix D.

## QUESTIONS PRESENTED

1. Whether the principles of *Younger* v. *Harris,* 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), and *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975), apply to the present case where appellees sought to have the federal district court enjoin appellants —State officials—from prosecuting a pending attachment proceeding against appellees in the Illinois courts.

2. Whether the procedures provided for by the Illinois Attachment Act, Illinois Revised Statutes 1973, Chapter 11, afford appellees—attachment debtors—due process of law.

## STATEMENT OF THE CASE

Appellees (hereinafter referred to as "plaintiffs") brought this class action in the district court challenging the constitutionality of the Illinois Attachment Act (reprinted at Appendix D), after the State of Illinois, on the relation of the Illinois Department of Public Aid, instituted attachment proceedings against plaintiffs in the Illinois courts. The Department filed its State suit to attach monies on deposit in plaintiffs' credit union account on the ground that plaintiffs applied for and received public assistance while fraudulently concealing the existence of that account.

The Illinois Attachment Act provides that a creditor having a money claim may attach the property of his debtor in any one of nine narrow circumstances, all of which either concern fraudulent conduct on the part of the debtor or the insecurity of the creditor due to the debtor's absence from the State (§1). A creditor is entitled to a writ of attachment if he files with the clerk of the court an affidavit setting forth the nature and amount of the claim and one of the nine circumstances set forth in section one (§2). In cases sounding in tort the creditor is required to be examined under oath by a judge concerning the cause of action (§2). Except where an agency of the State is involved, the creditor is required to furnish a bond in double the amount of the claim or double the amount of the property to be attached (§§ 4a, 4b).

Upon filing of a proper affidavit and the posting of bond, the clerk issues a writ of attachment directed to the sheriff, who executes the writ and also serves it upon the debtor (§§ 6, 8, 10). The writ is returnable and the debtor



must appear or answer on a date set by the plaintiff, which date shall not be less than ten nor more than sixty days from the date of the writ (§§ 6, 25). The creditor must file his complaint ten days before the return day, and if he does not do so within five days after the return date, the suit is subject to dismissal (§25). The debtor may at his option contest the attachment by a motion to quash, answer the creditor's claim on the merits (§27), or file any other paper appropriate to a civil proceeding (§26), such as a motion to dismiss. The burden of proof of establishing the propriety of the attachment and the underlying claim is upon the creditor. If the attachment is found to be wrongful, the debtor may recover damages and costs (§§ 4a, 27).

The debtor also has the right to retain or recover possession of the property in question by posting a bond in double the value of the property or in the amount of the debt (§§ 14, 15). In absence of this bond, the sheriff retains custody of the attached property (§ 14), or in the case of garnishment, the garnishee must withhold the property from the debtor (§ 21).

The Illinois Department of Public Aid brought its attachment suit on October 30, 1974, pursuant to section 11-21 of the Illinois Public Aid Code (Ill Rev. Stat. 1973, ch. 23, § 11-21, reprinted at Appendix E), which authorizes the Department to bring a civil and/or crimial action against any aid recipient who has concealed facts which would affect his eligibility for financial aid. The Department filed both the required affidavit and its complaint, which alleged that plaintiffs here (defendants in the state court) had fraudulently concealed the existence of monies in their credit union account, and that as a result, the Department had provided public assistance in the amount of $3,720.20, for which plaintiffs were not eligible.

The writ of attachment was thereupon issued and executed against the credit union account on November 5, 1974. Plaintiffs were served with the writ, complaint, and affidavit on November 8, 1974. Plaintiffs appeared on the return date, which had been set for November 18, 1974, but were informed that the matter had been continued until December 19, 1974.

Plaintiffs then brought the present action in the district court on December 2, 1974, attacking the validity of the Illinois Act and asking for injunctive relief. The plaintiffs asserted that the Illinois Act violates the due process clause in that it authorizes creditors to attach the assets of debtors upon allegations of fraudulent conduct without judicial review and without prior notice or an opportunity to be heard. The plaintiffs prayed that defendant Danaher (defendant Finley's predecessor) and all other clerks for the judicial circuits of Illinois be enjoined from issuing writs of attachment; that defendant Elrod and all other county sheriffs of Illinois be enjoined from executing such writs; and that defendants Trainor and O'Malley be enjoined from applying for such writs. The plaintiffs also requested a temporary restraining order and permanent injunction requiring defendants to dismiss the writ of attachment issued against the plaintiffs and return their property. Temporary relief was denied after defendants agreed to release one-half of the attached funds.

A three-judge court was designated pursuant to 28 U.S.C. § 2284, on March 21, 1975. The parties filed memoranda on the due process issue after defendants filed a motion to dismiss and plaintiffs cross-filed for summary judgment. The district court then directed that additional memoranda be filed in light of this Court's decision in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). The district court certified



this suit as both a plaintiff and defendant class action on October 1, 1975.

The court entered its judgment and opinion on December 15, 1975, granting plaintiffs the relief they requested. The defendants filed a motion for a stay of injunction pending appeal, which the court denied on February 25, 1976, the Honorable Wilber F. Pell, Jr., United States Circuit Court Judge, dissenting.

The State court attachment proceedings have been suspended, pending the final disposition of this case.

## ARGUMENT

### I.

### THE PRINCIPLES OF *YOUNGER* v. *HARRIS* AND *HUFFMAN* v. *PURSUE, LTD.* REQUIRE THAT THIS SUIT BE DISMISSED.

The same considerations which governed this Court's disposition of *Younger* v. *Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), and *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975), are equally applicable here, and dictate that the district court should have dismissed the instant case. Instead of deferring to the Illinois courts which are surely competent to handle any due process problems present in the pending attachment proceedings which gave rise to this case, the district court went to the merits of plaintiffs' constitutional challenge, striking down the Illinois Attachment Act and enjoining defendants—State officials—from proceeding under that Act.

Briefly stated, the *Younger* case held that absent certain extraordinary circumstances, considerations of equity, comity, and federalism preclude the federal courts from enjoining pending criminal prosecutions. This doctrine was extended to the civil arena in *Huffman*, at least where the "State is a party to the . . . proceeding, and the proceeding is both in aid of and closely related to criminal statutes." 420 U.S. at 604, 43 L. Ed. 2d at 492. Notwithstanding the facts that the State was the plaintiff in the pending attachment suit involved here and that the State was proceeding in aid of a statute which gave it the option of pursuing criminal and/or civil remedies in cases of welfare fraud, Ill. Rev. Stat. 1973, ch. 23, § 11-21, the district court held



*Huffman* inapplicable. The basis of the court's holding was that the Illinois Attachment Act provides a civil action available to anyone—public or private—while the statute in *Huffman* "gave an exclusive right of action to the State" and was itself quasi-criminal in nature. (Appendix B, p. B5). The Court found it "mere happenstance that the State of Illinois was the petitioner in the attachment proceeding," and "coincidental that the pending state proceedings may arguably be quasi-criminal in nature" (Appendix B, p. B5).

It is the State's position that the principles enunciated in *Younger* and *Huffman* are applicable to pending State civil proceedings generally, and to the present case particularly. In *Younger* this Court set forth the considerations underlying "the national policy forbidding federal courts to stay or enjoin state court proceedings except in exceptional circumstances" (401 U.S. at 42, 27 L. Ed. 2d at 674), as follows (401 U.S. at 43-44, 27 L. Ed. 2d at 675-76):

> The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal

sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism". . . . [This concept represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

The Court reiterated these principles in *Huffman* with particular emphasis on comity and federalism (420 U.S. at 601, 43 L. Ed. 2d at 490), and noted that the threat posed to our federal system by federal court interference is just as applicable to civil as well as criminal proceedings (420 U.S. at 604, 43 L. Ed. 2d at 492). The Court also identified the ways in which federal interference offends the principles of comity and federalism. Such interference results in duplicative legal proceedings, reflects negatively on the State court's ability to enforce constitutional principles (420 U.S. at 603, 43 L. Ed. 2d at 491), and prevents the State from effectuating its substantive policies and continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections to those policies (420 U.S. at 604, 43 L. Ed. 2d at 492).



It should be apparent that the above factors are fully applicable to the present case. Plaintiffs had the opportunity in the State court to assert the same constitutional objections which it presented to the federal district court, by filing a motion to quash, which would have come on for hearing on December 19, 1974—nearly a full year before the decision in this case. Such a course would have avoided dual proceedings, given the State an opportunity to rule on its own substantive policies (perhaps more definitively), and afforded the State courts the respect to which they are entitled.

The only possible bar to the application of *Younger* and *Huffman* to civil proceedings lies in the inapplicability of the principle "that equity will not enjoin a criminal prosecution" (420 U.S. at 604, 43 L. Ed. 2d at 492; 420 U.S. at 613, 43 L. Ed. 2d at 497, dissenting opinion), which the Court in *Younger* stated "may have grown out of circumstances peculiar to the English judicial system and not applicable in this country" (401 U.S. at 44, 27 L. Ed. 2d at 675). To the extent that this criminal factor retains any of its validity, it apparently rests on the State's paramount interest in defining crimes (420 U.S. at 614, 43 L. Ed. 2d at 498, dissenting opinion) and the additional protections afforded defendants in a criminal prosecution (420 U.S. at 615, 43 L. Ed. 2d at 499, dissenting opinion). Practically speaking, it is difficult to see why the State's interest in defining civil actions is any the less significant, especially in this case where the interest involved is the prevention of welfare fraud. And while it is true that civil proceedings provide lesser procedural guarantees, the sanctions resulting from these proceedings also have a significantly lesser impact.

Even assuming that *Huffman* is not applicable to civil proceedings generally, it should surely be applied in the

present case. The district court was able to avoid the *Huffman* doctrine only by focusing in on its supposed limited applicability to a certain class of civil cases, and then applying the supposed limitation to a case which might have been brought under the Illinois Act. Because of the nature of the considerations which gave rise to *Younger* and *Huffman,* however, it would seem that the limitation of *Huffman,* if valid at all, should be applied only to the specific proceeding before the court. In other words, the principles of *Younger* and *Huffman* apply to the instant case because the State is a party and the State civil proceeding involved is in aid of a criminal statute. Considerations of equity, comity and federalism are no less applicable to the present case merely because a private party could have brought a strictly civil action under the Illinois Act.

The extraordinary circumstances in which *Younger* and *Huffman* do not apply (and which help preserve the federal court's function as the ultimate guarantor of federally secured rights) are not present in this case. There is absolutely no indication of bad faith or harassment (420 U.S. at 611, 43 L. Ed. 2d at 496) in this suit. Nor is there any question of irreparable injury which resulted from the attachment of the $600 in plaintiffs' credit union. Plaintiffs earned a combined income of $15,719.81, during the period from January 1 through November 23, 1974. Their combined income during the period from April 17, 1972, through February 13, 1973, in which they collected $4,123.76 in public assistance, was more than $10,000.

The district court did hold that the Illinois Act was "patently and flagrantly violative of the constitution" (Appendix B, p. B5). The court, however, applied an unconstitutional "on its face" standard (Appendix B, p. B9-10). The proper standard is "flagrantly and patently violative



of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it" (420 U.S. at 611, 43 L. Ed. 2d at 496, 401 U.S. at 53-54, 27 L. Ed. 2d at 691). Assuming *arguendo,* that the application of the Illinois Act here violates plaintiffs' due process rights[1], it is not difficult to imagine situations and constructions of the Illinois Act which would pass constitutional muster, especially where the underlying debt sounds in tort and a pre-attachment hearing is, therefore, required. Moreover, the Act applies to actions already commenced, where the debtor is before the court and has had an opportunity to answer the creditor's complaint. In such circumstances, plaintiffs' due process allegations would be inapplicable.

In light of the district court's erroneous interpretation of *Huffman,* and the sensitive interests of federal-state relations involved in this case, it is submitted that this appeal deserves the plenary consideration of this Court. Furthermore, other lower federal courts have applied the principles of *Younger* and *Huffman* to State civil proceedings, and are thus in conflict with the district court's holding here. *Anonymous* v. *Association of the Bar of the City of New York,* 515 F. 2d 427 (2d Cir. 1975); *Duke* v. *Texas,* 477 F. 2d 244 (5th Cir. 1973); *Lynch* v. *Snepp,* 472 F. 2d 769 (4th Cir. 1973); *Cousins* v. *Wigoda,* 463 F. 2d 603 (7th Cir. 1972).

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1. In light of Argument II, *infra,* which demonstrates the validity of the Illinois Act, it is impossible to see how the court reached the conclusion that the Act was patently and flagrantly unconstitutional.

## II.

## THE PROCEDURES PROVIDED FOR BY THE ILLINOIS ATTACHMENT ACT COMPORT WITH PRINCIPLES OF DUE PROCESS.

Assuming *arguendo,* that the principles of *Younger* and *Huffman* do not apply to this case, this Court should nevertheless take this case for plenary consideration so that the procedures of the Illinois Attachment Act can be tested against the due process requirements of the fourteenth amendment. The procedures in question here compare quite favorably with those which this court upheld in *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974). The district court's decision, however, effectively restricted the holding of *Mitchell* to the facts of that case rather than applying the traditional due process balancing of interests test to the facts of this case, as is mandated by the *Mitchell* decision.

In *Mitchell* this Court upheld a Louisiana statute which provides for sequestration of property where "one claims the ownership or right to possession of property . . . if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." Under the statute a writ of sequestration issues "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts." The creditor is required to make this showing before a judge. He may do so, however, on ex parte application, without notice to the debtor or an opportunity to be heard. The debtor is entitled to seek immediate dissolution of the writ unless the creditor "proves the grounds upon which



the writ was issued" (416 U.S. at 605-06, 40 L. Ed. 2d at 412-13).

In *Mitchell* the creditor filed suit alleging default in payment on an installment sales contract and requested that the property over which it had a vendor's lien be sequestered. The creditor also asserted that it had reason to believe that the debtor would "encumber, alienate or otherwise dispose of the merchandise described in the foregoing petition during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises." Based on the creditor's petition and affidavit, a Louisiana State court ordered, without prior notice or an opportunity for the debtor to be heard, that the property be sequestered. The property was seized on February 7, 1972, and on March 3rd, the debtor attacked the sequestration as violative of his due process rights. The court upheld the sequestration on March 16th, which decision was affirmed by the Supreme Court of Louisiana (416 U.S. at 601-03, 40 L. Ed. 2d at 410-11).

In upholding the Louisiana provision, this Court weighed the competing interests involved, stating (416 U.S. at 610, 40 L. Ed. at 415):

> The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." Due process of law guarantees "no particular form of procedure; it protects substantial rights." "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Considering the Louisiana procedure as a whole, we are convinced that the State has reached a constitutional accommodation of the respective interests of buyer and seller. [citations omitted]

The Court found the possible deterioration and destruction of the property over which the creditor had a lien to be a significant interest which outweighed the impact on the debtor of the deprivation of the property in question, in view of the low risk of a wrongful sequestration under the procedures of the Louisiana statute (416 U.S. at 610, 40 L. Ed. 2d at 415).

The Court also stated (416 U.S. at 609, 40 L. Ed. 2d at 414):

> [T]here is scant support in our cases for the proposition that there must be final judicial determination of the seller's entitlement before the buyer may be even temporarily deprived of possession of the purchased goods. On the contrary, it seems apparent that the seller with his own interest in the disputed merchandise would need to establish in any event only the probability that his case will succeed to warrant the bonded sequestration of the property pending outcome of the suit. The issue at this stage of the proceeding concerns possession pending trial and turns on the existence of the debt, the lien, and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof; and we think it comports with due process to permit the initial seizure on sworn ex parte documents, followed by the early opportunity to put the creditor to his proof. [citations omitted]

In balancing the interests, risks, and statutory safeguards under the Illinois Attachment Act, it seems clear that the scales tip toward the validity of the Act, at least as applied here. The creditor is required to file an affidavit setting forth the nature and amount of his claim, as well as one of the nine narrow circumstances in which attachment may issue (§§ 1, 2). The affidavit must allege facts unequivocally, and not merely on information and belief



(*e.g. Rabbitt* v. *Weber & Co.*, 297 Ill. 491, 130 N.E. 787 (1921); *Brandenburg* v. *Chicago Knitting Co.*, 102 Ill. App. 303 (1902)). And while such averments might be characterized as somewhat conclusory (see court's opinion, Appendix B, p. B 10), they are no more so than the creditor's in *Mitchell*. Furthermore, in this case, a sworn complaint was filed in the State court contemporaneously with the filing of the affidavit, which specifically set forth the basis of the State's claim.

While a creditor's lien is not involved in this case, as was in *Mitchell*, the Illinois Act is narrowly drawn to extend only to cases of fraud or the debtor's absence from the State. These circumstances present a very real and definite threat to the creditor—far more so than was involved in *Mitchell*.

In actions sounding in tort, the creditor must be examined by a judge concerning his cause of action before a writ of attachment may issue (§2),[2] In contract actions, the matters involved are ordinarily substantiated by documentary proof (416 U.S. at 609, 40 L. Ed. 2d at 415), which in practical effect means that an ex parte appearance before a judge would be a mere formality. The debtor is also protected by the creditor's bond, except where a State

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2. The complaint filed in the State court in this case proceeded upon a contract theory. Since the underlying claim is fraud, however, it seems apparent that plaintiffs could have attempted an attack on the writ of attachment as being illegally issued, in that fraud sounds in tort, and thus, it was necessary for State to apply to a judge for the writ. Whether the State should have so proceeded in this case is a question peculiarly for the State courts.

agency is the creditor as here (§§ 4a, 4b), and may recover damages for wrongful attachment in all cases (§4a, 27). The debtor may also recover possession of the property by filing a bond (§§ 14, 15). Destruction of the attached property is precluded because the Sheriff retains custody of it (§14).

The debtor is also given an early, through admittedly not immediate, hearing within sixty days of the attachment (§§ 6, 25),[3] and he may well be able to advance the date of the hearing by filing a motion to dismiss. At the hearing he may either attack the attchment itself or defend on the underlying claim (§ 26). The burden of proof is on the creditor.

In sum, the impact of the attachment on the debtor under the Illinois Act is outweighed by the immediate and serious threats to creditors as narrowly defined by the Illinois Act (§ 1), the provisions safeguarding against wrongful attachments (§§ 2, 4a, 4b, 14, 26, 27), and the debtor's early opportunity for a hearing (§§ 6, 25).

The validity of the *Mitchell* approach to the due process requirements of seizure of a debtor's property was in no sense impaired by this Court's holding in *North Georgia*

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3. Plaintiffs surveyed the attachment cases filed in Cook County, Illinois in 1974. Of the 97 cases initiated, they located 78 case files. The average period of time in these cases between the date on which the writ of attachment was served and the return date was 18.2 days, the longest period being 59 days. In the 13 cases in which the debtors appeared on the return day, the average period of time between the date the writ was served and the trial date was 39 days, the longest period being 70 days. In the present case, the period between service of the writ and the scheduled trial date was 42 days.



*Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975), as plaintiffs claimed in the district court. The statute in this case had "none of the saving characteristics of the Louisiana statute" (419 U.S. at 607, 42 L. Ed. 2d at 757), while the statute involved in this case closely parallels the Louisiana provision.

Moreover, the Illinois Act, as applied in this case, passes constitutional muster even under the broad sweep of *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). While striking down two pre-judgment replevin statutes in that case, this Court recognized that certain governmental interests may serve as a basis for immediate pre-trial action (407 U.S. at 90-91, 32 L. Ed. 2d at 575-76);

> There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. [Citations and footnotes omitted].

The attachment of funds in plaintiffs' credit union account is "directly necessary to secure an important governmental interest." The Illinois Department of Public Aid attached the amount as part of its general effort to eliminate various forms of welfare fraud (Ill. Rev. Stat. 1973, ch. 23, § 11-21; See Appendix E). There is a "special need for very pr mpt

action," because in dealing with the type of welfare case at issue, there is a real danger that the recipient under investigation will take steps to hinder the inquiry by either removing the funds from their present location or leaving the jurisdiction. The State has a significant interest in the subject property that has been attached, which cannot be sufficiently protected if a lapse of time were to ensue before seizure of the property. The State has exercised its statutory authority to investigate and correct fraudulent acts only after careful investigation, and is able to exercise this authority to attach property only where there is a very real danger of inability to collect the money to which it is entitled, absent attachment.

In light of the vital state interests involved in this case and the fact that this Court has not spoken to the validity of procedures like those provided for by the Illinois Act, it is respectfully submitted that this Court give this case plenary consideration. The following cases are inconsistent with the district court's decision in this case: *Hutchison* v. *Bank of North Carolina,* 392 F. Supp. 888 (M.D. N.C. 1975); *Harrison v. Morris,* 370 F. Supp. 142 (D. S.C. 1974).



## CONCLUSION

For the foregoing reasons, appellants believe that the questions presented by this appeal are substantial and of broad importance and application. Appellants, therefore, respectfully urge this Honorable Court to give this case its full consideration and reverse the district court's judgment.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (793-3500),
*Attorney for Appellants,*
*Trainor and O'Malley.*

PAUL J. BARGIEL,
STEPHEN R. SWOFFORD,
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*Of Counsel.*

# APPENDICES



## APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

*Plaintiffs,*

v.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Acting Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

*Defendants.*

No. 74 C 3473

ORDER

In accordance with this Court's memorandum opinion, the Court enters judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure as follows:

1. Illinois Revised Statutes, Chapter 11, Sections 1, 2, 2a, 6, 8, 10 and 14 are on their face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Defendants Finley and Elrod are ordered to cause release of all property of plaintiffs Juan and Maria Hernandez attached pursuant to writ of attachment.

3. Defendant Finley and all other clerks for the judicial circuits of Illinois, their successors, agents and employees are hereby enjoined from issuing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11 §1, subsections sixth through ninth.

4. Defendant Elrod and all other county sheriffs of the State of Illinois, their successors, agents and employees are hereby enjoined from executing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11 §1, subsections sixth through ninth.

5. Defendants Trainor and O'Malley are hereby enjoined from authorizing and processing applications for writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, §1, subsections sixth through ninth.

6. Defendants Finley and Elrod, all other clerks of the judicial circuits of Illinois, and all other county sheriffs of Illinois, are ordered to cause release of any property currently attached pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, §1, subsections sixth through ninth, and give notice of such release to all persons whose property is the object of such attachments.



7. The question of plaintiffs' entitlement to money damages is remanded for determination to Judge Kirkland, the Judge to whom this case was originally assigned.

ENTER:

WILBUR F. PELL, JR.,
U.S. Circuit Court Judge

JOEL M. FLAUM
U.S. District Court Judge

ALFRED Y. KIRKLAND
U.S. District Court Judge

DATED: Dec. 15, 1975

## APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

*Plaintiffs,*

v.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Acting Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

*Defendants.*

No. 74 C 3473

Before PELL, Circuit Judge, FLAUM and KIRKLAND, District Judges.

KIRKLAND, District Judge. This matter comes before the Court on motion of defendants to dismiss the complaint for failure to state a claim upon which relief could be

granted. Plaintiffs have cross-filed for summary judgment on entitlement to declaratory and injunctive relief. Further, on instruction by the Court, the parties briefed the issue of whether, in light of *Huffman* v. *Pursue Ltd.*, —— U.S. ——, 95 S. Ct. 1200 (1975), this Court should enjoin a pending state attachement proceeding against plaintiffs prior to exhaustion of state judicial remedies.

The Illinois Department of Public Aid ("IDPA") filed suit in Circuit Court of Cook County, Illinois, on October 30, 1974, alleging that plaintiffs had fraudulently concealed the existence of monies while applying for and receiving public aid assistance. Simultaneous with filing of this suit, IDPA filed an attachment complaint which resulted in attachment of plaintiffs' funds in a credit union on November 5, 1974. After answering the complaint and filing their appearance, plaintiffs filed the instant complaint in federal court challenging the constitutionality of the Illinois Attachment Act and seeking declaratory, injunctive and other relief.

Jurisdiction is alleged under 28 U.S.C. §1343 (3) and (4) and 42 U.S.C. §1983. The complaint challenges the constitutionality of the Illinois Attachment Act, Ch. 11 §§1, 2, 2a, 6, 8, 10, and 14. The Act is alleged to be unconstitutional both on its face and as applied on grounds that it violates the due process clause of the Fourteenth Amendment to the United States Constitution.

Two issues are presented to this Court for decision: (1) does *Huffman* v. *Pursue Ltd., supra,* prevent this Court from intervening in a state civil proceeding filed pursuant to a state statute alleged to be unconstitutional; and (2) if the preceding question is answered in the negative, are the challenged portions of the Illinois Attachment Act unconstitutional?



## I. MUST FEDERAL ACTION BE RESTRAINED PENDING EXHAUSTION OF STATE REMEDIES?

The Supreme Court in *Huffman* extended for the first time the doctrine of non-interference with state criminal proceedings, articulated in *Younger* v. *Harris,* 401 U.S. 37 (1971), to a civil proceeding. The remedy presently sought by plaintiffs would require this Court to enjoin a state court civil proceeding; hence we are constrained at the outset to examine the applicability of *Huffman* prior to any consideration of the merits of this case.

The only obstacle to reaching the merits of this case would be a determination that the principles articulated in *Huffman* apply here.

It is clear that this Court is empowered to enjoin state action under certain circumstances, notwithstanding the general prohibition against such injunctions found in 28 U.S.C. §2283. *Mitchum* v. *Foster,* 407 U.S. 225 (1972), held that the anti-injunction rule of Section 2283 does not apply to civil rights actions under 42 U.S.C. §1983. Likewise, if the Illinois attachment proceeding were determined not to be "proceedings in a state court", the anti-injunction statute by its own terms would not apply. This Court holds the challenged attachment proceeding to be a pending proceeding within the meaning of Section 2283.

The *Huffman* case arose out of an attempt by the State of Ohio to close a theatre which showed allegedly obscene films, on grounds that the theatre was creating a public nuisance. The state proceeded under the Ohio nuisance statute, which defined a place exhibiting obscene films as a nuisance. The Ohio Court determined in an adversary proceeding that the films were obscene and immediately

ordered that the theatre be closed. Following this decision, and without exhausting state appellate procedure, the theatre operator filed suit in federal court. A three-judge district court held that closing of the theatre by the Ohio State Court was violative of the plaintiff operator's constitutional rights because the films had not been declared obscene prior to their exhibition. The plaintiff operator had not exhibited any films after the determination that said films were obscene.

The Supreme Court vacated the order of the three-judge court on grounds of equity, comity, and federalism, holding that the principles of *Younger* v. *Harris, supra.*, were applicable even though the state proceeding was civil in nature.

The *Younger* decision gave approval to long-standing policy that federal courts should not interfere with state criminal proceedings except in extraordinary circumstances. See *Fenner* v. *Boykin*, 271 U.S. 240 (1926); *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935); *Stefanelli* v. *Minard*, 342 U.S. 117 (1951). *Younger* specifically held that federal injunctive relief should not be employed against state criminal prosecutions except: (1) upon a showing of "irreparable injury" that is both "great and immediate"; or (2) where the statute in question is "flagrantly and patently violative of express constitutional prohibitions". 401 U.S. at 53.

The decision in *Huffman* is significant in that it represents the first extension of these principles to non-criminal proceedings. In extending this doctrine, the Court stated that action of the State of Ohio was more akin to criminal proceedings than most civil cases. 95 S.Ct. 1208. This Court is of the opinion, however, that *Huffman* v. *Pursue Ltd.* is not applicable here for two reasons.



First, the rule of *Younger* was established for, and has been limited in application to, criminal proceedings. The Court's principal justification for extension of the *Younger* doctrine in *Huffman* was that Ohio's civil proceeding was "in aid of and closely related to criminal statutes". 95 S. Ct. 1208. In *Huffman*, the State of Ohio proceeded under a statute which gave an exclusive right of action to the state. By contrast, the Illinois Attachment Act provides a cause of action for any person, public or private. It is mere happenstance that the State of Illinois was the petitioner in this attachment proceeding. It is likewise coincidental that the pending state proceedings may arguably be quasi-criminal in nature; under the Illinois Attachment Act, they need not be. These major distinctions preclude this Court from extending the principles of *Younger*, based on considerations of equity, comity and federalism, beyond the quasi-criminal situation set forth in *Huffman*.

Second, an express exception to the *Younger* rule of non-interference in state criminal proceedings exists where the challenged statute is patently and flagrantly violative of the constitution. This Court is of the opinion that the present case falls within that exception, for reasons hereinafter set forth.

## II. IS THE ILLINOIS ATTACHMENT ACT UNCONSTITUTIONAL?

Four recent Supreme Court cases are controlling authority in an analysis of constitutional validity of summary creditor remedies. These cases include *Sniadach* v. *Family Finance Corp.*, 397 U.S. 254 (1969), *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974); and *North Georgia Finishing Inc.* v. *Di-Chem Inc.*, —— U.S. ——, 42 L. Ed. 753 (1975).

In *Sniadach* v. *Family Finance Corp., supra,* the Court held that a Wisconsin pre-judgment garnishment procedure which resulted in garnishment of wages without notice and prior hearing, violated fundamental principles of due process.

In *Fuentes* v. *Shevin, supra,* the Supreme Court examined the replevin acts of Florida and Pennsylvania. Both acts authorized the issuance of pre-judgment writs of replevin through a summary process of *ex parte* application to the court clerk, accompanied by the posting of bond for an amount in excess of the property's value. Neither act provided for notice and prior hearing or an immediate post-seizure hearing. Both acts did permit the respondent to recover his replevied property upon posting of a bond in double the amount of its value. The Court held that procedural due process required that a person in possession of chattels be given an opportunity for a hearing prior to issuance of a writ of replevin. The Court further held that posting of a bond was a minimal deterrent to abusive or even good faith use of the replevin procedure and constituted no substitute for a pre-seizure hearing.

In *Mitchell* v. *W. T. Grant Co., supra,* the Supreme Court carved out an exception to the pre-seizure hearing rule promulgated in *Sniadach* and *Fuentes.* There the Court upheld the validity of a Louisiana sequestration act which authorized sequestration of encumbered property upon *ex parte* application of a creditor without notice to the debtor or opportunity for prior hearing. The Court found, however, that the Louisiana act did provide safeguards not present in those statutes analyzed in *Sniadach* and *Fuentes.*

First, the Louisiana act required the creditor to file an affidavit before a judge, setting forth factual rather



than conclusory allegations which entitled the creditor to relief. A writ would only issue by the judge upon the proper showing. Second, and of equal importance, the act expressly entitled the debtor to an immediate post-seizure hearing; a hearing in which the burden was upon the creditor to prove the allegations contained in the affidavit. The Court found that these provisions sufficiently safeguarded the rights of the debtor to eliminate necessity for prior notice and hearing.

A Georgia garnishment act was examined by the Court in *North Georgia Finishing Inc.* v. *Di-Chem, supra.* The Court determined that Georgia's summary procedure for garnishment satisfied neither the *Sniadach* and *Fuentes* requirement of pre-seizure hearing, nor the alternative judicial safeguards approved in *Mitchell.*

Having briefly summarized the applicable law, the Court now turns to the Illinois statute under constitutional challenge.

The Illinois Attachment Act (Illinois Revised Statutes, Ch. 11, 1973) authorizes a creditor with a money claim, whether liquidated or unliquidated and whether sounding in contract or tort, to attach the assets of an alleged debtor pending outcome of a lawsuit against the debtor on the money claim. The creditor can obtain a writ of attachment prior to filing his complaint against the debtor[1] and prior to the debtor having received notice of impending attachment or an opportunity to be heard on the question of whether the writ should issue.

---

1. Pursuant to §25 of the Act, the complaint must be filed at least ten days before the return date of the writ of attachment.

Section 1 of the Act provides for attachment in any of nine circumstances. Plaintiffs specifically attack four subsections which authorize attachment upon the creditor's allegations of debtor fraud:

> SIXTH: Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.
>
> SEVENTH: Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.[2]
>
> EIGHTH: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors. NINTH: Where the debt sued for was fraudulently contracted on the part of the debtor. . . . Ill. Rev. Stat., Ch. 11 §1, sixth through ninth.

A creditor will be entitled to a writ of attachment, against an alleged debtor's property, upon the filing of an affidavit by the creditor, or his agent or attorney, which sets forth in verbatim statutory language one of the above allegations, along with the nature and amount of the claim and the name and place of residence of the debtor. Upon filing of this affidavit and the required bond with the clerk of the circuit court, the clerk issues a writ of attachment directing the sheriff to serve it upon the debtor, or another person holding the debtor's property.

If the action sounds in tort, under Section 2 of the Act the creditor must apply to a judge of the circuit court.

---

2. This is the sole allegation of fraud set forth in the affidavit of Defendant O'Malley upon which the writ of attachment was issued.



The judge, after questioning the creditor concerning the cause of action, endorses upon the affidavit the amount of damages for which the writ shall issue. Upon service of the writ, the sheriff takes and retains custody of the property attached or directs a third party in possession to withhold the attached property from the debtor.

The debtor may obtain release of his property prior to trial on the merits of the creditor's claim in two ways. First, the debtor can file a bond in double the value of the property attached, upon the condition that said property will be available for execution should judgment be rendered against him. Alternatively, he can file a bond in a sum sufficient to cover the amount of debt or damages alleged plus costs of suit.

Second, Section 27 of the Act provides that defendant debtor may answer by affidavit, denying the allegations set forth in the creditor's attachment affidavit; and if the court finds for defendant after trial on the merits of the attachment, the writ will be quashed. This section, however, does not give defendant an absolute right to a hearing on the attachment issue immediately after seizure.

The debtor whose property has been attached is thereby deprived of the use of his property from the date the writ is served until an uncertain future time when he receives a hearing on the attachment issue. Even if the debtor should seek a separate hearing thereon on the return date, the debtor can be deprived of his property for a period of sixty days, since Section 6 of the Act provides that the creditor shall set the return date from ten to sixty days after date of the writ.

It is clear on its face that the Illinois Attachment Act does not meet the due process standards established by the Supreme Court in the cases previously discussed.

The Illinois Act does not provide for pre-seizure hearing as required by *Fuentes*. Because of *Mitchell* v. *W. T. Grant Co., supra,* however, this Court does not hold that pre-seizure hearing is any longer an absolute requirement. However, neither does the Act provide the alternative safeguards approved by *Mitchell*. Specifically, the Illinois Act does not require the attachment creditor to set out facts in his affidavit which would entitle him to relief. The Act does not require the complainant to present such affidavit to a judge for determination of whether a writ should issue. Instead, the Act provides that upon conclusory allegations in verbatim statutory language, coupled with certain procedural information, a writ will automatically issue from the clerk of the court.

The provision for judicial review in tort cases is limited only to the question of potential damages and determination of limit on the amount of property to be attached. The judge is not required to evaluate the legal sufficiency of sworn facts as was the case in *Mitchell*.

Neither does the Act provide for an *immediate* post-seizure hearing upon application of the debtor, a hearing in which the attachment creditor bears the burden of proving his entitlement to relief at risk of dissolution of the writ. The Illinois Act merely provides for a post-seizure hearing on application by the debtor at a time to be set at the convenience of the Court. The Court, therefore, is under no duty to set an immediate hearing.

For these reasons, this Court holds that the Illinois Attachment Act is on its face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

Plaintiffs are entitled to injunctive relief against defendants. Separate order to issue in accordance with this opinion.

**December 15, 1975.**



## APPENDIX C

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | |
|---|---|
| JUAN HERNANDEZ, et al.,<br>Plaintiff-Appellees,<br>vs.<br>MORGAN M. FINLEY, et al.,<br>Defendants-Appellants. | Civil Action<br>No. 74 C 3473 |

**NOTICE OF APPEAL TO THE**
**SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that James Trainor and Vivian O'Malley, defendants herein, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on the 15th day of December, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1253.

WILLIAM J. SCOTT
Attorney General
State of Illinois
By: PAUL J. BARGIEL
Assistant Attorney General
160 North LaSalle Street,
Suite 800
Chicago, Illinois 60601
(793-5635)

RECEIVED
FEBRUARY 3, 1976

H. STUART CUNNINGHAM, CLERK
UNITED STATES DISTRICT COURT

## PROOF OF SERVICE

I, Paul J. Bargiel, one of the attorneys for James Trainor and Vivian O'Malley, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of February, 1976, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On Juan Hernandez and Maria Hernandez, individually and on behalf of all other persons similarly situated, plaintiffs, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorneys of record, as follows:

Alan Dockterman
1413 West 18th Street
Chicago, Illinois 60608

James Latturner, Catherine Reichelderfer & Fred L. Lieb
4564 N. Broadway
Chicago, Illinois 60640

2. On Morgan M. Finley, Clerk of the Circuit Court of Cook County, Illinois, and Richard J. Elrod, Sheriff of Cook County, Illinois, defendants, by mailing copies in duly



addressed envelopes, with first class postage prepaid, to their attorneys of record, as follows:

Bernard Carey
State's Attorney of Cook County, Illinois
John A. Dienner, III
Assistant State's Attorney
500 Civic Center
Chicago, Illinois 60602

By: PAUL J. BARGIEL
Assistant Attorney General
160 N. LaSalle St., Suite 800
Chicago, Illinois 60601
(793-5635)

SUBSCRIBED AND SWORN to
before me this 3rd day
of February, 1976.

MAUREEN WALSH,
NOTARY PUBLIC

# APPENDIX D

## THE ILLINOIS ATTACHMENT ACT, ILLINOIS REVISED STATUTES 1973, CHAPTER 11.

1. Causes.] § 1. In any court having competent jurisdiction, a creditor having a money claim, whether liquidated or unliquidated, and whether sounding in contract or tort, may have an attachment against the property of his debtor, or that of any one or more of several debtors, either at the time of instituting suit or thereafter, when the claim exceeds $20, in any one of the following cases:

First: Where the debtor is not a resident of this State.

Second: When the debtor conceals himself or stands in defiance of an officer, so that process cannot be served upon him.

Third: Where the debtor has departed from this State with the intention of having his effects removed from this State.

Fourth: Where the debtor is about to depart from this State with the intention of having his effects removed from this State.

Fifth: Where the debtor is about to remove his property from this State to the injury of such creditor.

Sixth: Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.

Seventh: Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.

Eighth: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.

Ninth: Where the debt sued for was fraudulently contracted on the part of the debtor: Provided, the statements of the debtor, his agent or attorney, which constitute the fraud, shall have been reduced to writing, and his signature attached thereto, by himself, agent or attorney.

1a. Venue.] § 1a. The venue provisions applicable to other civil cases shall apply to attachment proceedings; and in addition thereto, attachment proceedings may be brought in the County where property or credits of the debtor are found.

2. Affidavit — Statement — Examination under oath.] § 2. To entitle a creditor to such a writ of attachment, he or his agent or attorney shall make and file with the clerk of the circuit court, an affidavit setting forth the nature and amount of the claim, so far as practicable, after allowing all just credits and set-offs, and any one or more of the causes mentioned in section 1, and also stating the place of residence of the defendants, if known, and if not known, that upon diligent inquiry the affiant has not been able to ascertain the same together with a written statement, either embodied in such affidavit or separately in writing, executed by the attorney or attorneys representing the creditor, to the effect that the attachment action invoked by such affidavit does or does not sound in tort, also a designation of the return day for the summons to be issued in said action. In all actions sounding in tort, before the writ of attachment shall be issued, the plaintiff, his agent or attorney, shall apply to a judge of the circuit court of the county in which the suit is to be brought or is pending and be examined,



under oath, by such judge concerning the cause of action; and, thereupon, such judge shall indorse upon the affidavit the amount of damages for which the writ shall issue, and no greater amount shall be claimed.

2a. Form of affidavit.] § 2a. Affidavits for attachment before courts may be substantially in the following form:

STATE OF ILLINOIS, )
) ss.
..... County )

A B, being duly sworn, says: That (here state if affiant is agent or attorney of the creditor; if suit is by an individual or corporation, the name of such individual or corporation, and if the suit is by a firm, the name of the partners) has a just demand against (name of debtor), on account of (here make short statement of the nature and amount of the claim), and the affiant believes (the name of the creditor) is entitled to recover of said (name of debtor), after allowing all just credits and set-offs ..... dollars and ..... cents. which is now due, and that he has good reason to believe and does believe that (name of debtor) (here state the residence of the debtor if known, or if not, that the affiant has made diligent inquiry and cannot ascertain his place of residence.)

.....

Subscribed and sworn to before me on this ..... day of ....., ....., A.D.

.....

My commission expires ....., ....., A. D.
(If action sounds in tort here include the endorsement

of judge as to amount of damages for which writ shall issue.)

3. Names, etc., heirs, etc.] § 3. [Omitted]

4. § 4. Repealed]

4a. Bond — State and its departments and officers exempt.] § 4a. Before granting an attachment, as aforesaid, the clerk shall take bond and sufficient security, payable to the People of the State of Illinois, for the use of the person or persons interested in the property attached, in double the sum sworn to be due, conditioned for satisfying all costs which may be awarded to such defendant, or to any others interested in said proceedings, and all damages and costs which shall be recovered against the plaintiff, for wrongfully suing out such attachment — which bond, with affidavit of the party complaining, or his agent or attorney, shall be filed in the office of the clerk granting the attachment. Every attachment issued without a bond and affidavit taken, is hereby declared illegal and void, and shall be dismissed: Provided, however, that nothing herein contained shall be construed to require the State of Illinois, or any Department of Government thereof, or any State officer, to file a bond as plaintiff in any proceeding instituted under this Act.[1]

4b. Court may fix bond in double value of property to be attached.] § 4b. The court, or a judge thereof, upon ex parte motion, without notice, supported by affidavit of the plaintiff, his agent or attorney, substantially describing the property to be attached, and the value thereof, may, if satisfied of the bona fides of the application and sufficiency of the bond under the circumstances of the case,

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[1]Section 1 et seq. of this chapter.



including proposed garnishments, fix the amount of the bond in double the value of the property to be attached, instead of double the sum sworn to be due, and in such event the writ shall direct the officer to attach said specifically described property, but the value of said property to be attached shall not be in excess of an amount sufficient to satisfy the debt claimed and costs. The court may require that said affidavit be supplemented by additional showing, by appraisal or otherwise, as to the value of said property, and may, upon motion of any party to the action claiming an interest in said property, either before or after actual attachment, require additional security, or order release of the attachment to the extent not covered by adequate double security.

5. Condition of bond.] § 5. The condition of the bond required in the preceding section[1] shall be applicable to alias and pluries writs as well as original writs and shall be substantially in the following form:

The condition of this obligation is such, that whereas the above bounden ..... hath, on the day of the date hereof, prayed an attachment out of the ..... Court of said County, at the suit of ..... against the estate of the above named ..... Now, if the said ..... shall prosecute his suit with effect, or in the case of failure therein shall well and truly satisfy all costs which may be awarded to said ..... or to any person or persons interested in the property attached, and all damages and costs which shall be recovered against the plaintiff for wrongfully suing out the said writ of attachment, or alias or pluries

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[1]"Preceding section" now repealed. But see section 4a, ante.

writ or writs of attachment, then the above obligation to be void; otherwise to remain in full force and effect.

Additional bonds shall not be required for the issuance of alias and pluries writs, except as provided in Section 10a[2] of this Act.

6. Writ — Form.] § 6. The writ of attachment required in the preceding section shall be directed to the sheriff (and, for purpose only of service of summons, to any person authorized to serve writs of summons), or in case the sheriff is interested, or otherwise disqualified or prevented from acting, to the coroner of the county in which the suit is commenced, and shall be made returnable on a return day designated by the plaintiff, which day shall not be less than ten days or more than sixty days after its date. Such writ shall be substantially in the following form: ,The People of the State of Illinois to the Sheriff of ..... County: or for the purpose only of service as summons; to any person authorized to serve writs of summons: — Greeting:

Whereas A B (or agent or attorney of A B, as the case may be), hath complained that C D is justly indebted to the said A B to the amount of ..... and that (here state the cause set out in the affidavit) and the said ..... having given bond and security, according to law: We therefore command you that you attach so much of the estate, real or personal, of the said C D, to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the affidavit, but in case any specific property of the said C D, found in your county shall be described in this writ, then you

---

[2]Section 10a of this chapter.



shall attach said described property only, and no other property, the said specified property to be so attached, being described as follows:

.....

.....

and such estate so attached in your hands to secure, or so to provide, that the same may be liable to further proceedings thereupon, according to law; and that you summon C D to appear and answer the complant of said A B, before the ..... ..Court of ..... at ..... in the county of ..... on the ..... day of ..... next; and that you also summon ..... and such other persons as you shall be required by the said A B, as garnishees, to be and appear before the said court on the said ..... day of ..... next, then and there to answer to what may be objected against them. When and where you shall make known to the said court how you have executed this writ, and have you then and there this writ.

Witness ..... clerk of the said court, this ..... day of ..... in the year of our Lord, etc.

Which writ of attachment shall be signed by the clerk, and the seal of the court shall be affixed thereto.

7. Attachment against a joint debtor.] § 7. In all cases where two or more persons are jointly indebted, either as partners or otherwise, and an affidavit shall be filed as provided in the first section of this act, so as to bring one or more of such joint debtors within its provisions, and amenable to the process of attachment, then the writ of attachment shall issue against the property and the effects of such as are so brought within the provisions of this act; and the officer shall be also directed in said writ to summon, all defendants to the action, whether the at-

tachment is against them or not, to answer to the said action, as in other cases of joint defendants.

8. Execution of writ.] § 8. Such officer shall without delay execute such writ of attachment upon the property described in the writ, or in the absence of such description, upon the lands, tenements, goods, chattels, rights, credits, moneys and effects of the debtor, or upon any lands and tenements in and to which such debtor has or may claim any equitable interest or title, of sufficient value to satisfy the claim sworn to, with costs of suit as commanded in such writ.

Except as provided in Section 11[1] of this act, the writ of attachment may be levied only in the county to which the writ is issued, and by a proper officer of said county.

9. Certificate of levy — Effect.] § 9. [Omitted]

10. Serving defendant — Return.] § 10. The officer shall also serve said writ upon the defendant therein, if he can be found, in like manner as provided for service of summons in other civil cases. The return of such writ shall state the particular manner in which the same was served. If the writ is served upon the defendant less than ten days before the return day thereof, he shall not be compelled to appear or plead until fifteen days after the return day designated in the writ. The writ of attachment may be served as a summons upon defendants wherever they may be found in the State, by any person authorized to serve writs in like manner as summons in other civil cases.

10a. Alias and pluries writs.] § 10a. [Omitted]

11. Pursuit of property.] § 11. [Omitted]

12. Writ issued and served on Sunday.] § 12. [Omitted]

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[1]Section 11 of this chapter.



13. Writs to other counties.] § 13. [Omitted]

14. Possession — Forthcoming bond.] § 14. The officer serving the writ shall take and retain the custody and possession of the property attached, to answer and abide by the judgment of the court, unless the person in whose possession the same is found shall enter into bond and security to the officer, to be approved by him, in double the value of the property so attached with condition that the said estate and property shall be forthcoming to answer the judgment of the court in said suit. The sheriff, or other officer shall return such bond to the court in which the suit is brought, on the day to which such attachment is returnable.

15. Bond or recognizance to pay judgment.] § 15. Any defendant in attachment, desiring the return of property attached, may, at his option, instead of or in substitution for the bond required in the preceding section, give like bond and security, in a sum sufficient to cover the debt and damages sworn to in behalf of the plaintiff, with all interest, damages and costs of suit, conditioned that the defendant will pay the plaintiff the amount of the judgment and costs which may be rendered against him in that suit, on a final trial, within ninety days after such judgment shall be rendered or a recognizance, in substance as aforesaid, may be taken in open court, and entered of record, in which case the court shall approve of the security and the recognizance made to the plaintiff, and upon a forfeiture of such recognizance judgment may be rendered and execution issued as in other cases of recognizance. In either case, the attachment shall be dissolved, and the property taken restored, and all previous proceedings, either against the sheriff or against the garnishees, set aside, and the cause shall proceed as if the defendant had been seasonably served with a writ of summons.

16. Neglect of officer to take bond — Proceedings.] § 16. [Omitted]

17. Neglect to return sufficient bond — Proceedings.] [Omitted]

18. Suit on bond.] § 18. [Omitted]

19. Sustenance of live stock — Compensation.] § 19. When any sheriff or other officer shall serve an attachment on horses, cattle or live stock, and the same shall not be immediately replevied or restored to the debtor, such officer shall provide sufficient sustenance for the support of such live stock until the same shall be sold or discharged from such attachment. He shall receive therefor a reasonable compensation, to be ascertained and determined by the court out of which the attachment issued, and charged in the fee bill of such officer, and shall be collectible as part of the costs.

20. Perishable property.] § 20. When any goods and chattels are levied on by virtue of any attachment, and the sheriff or other officer having custody of such goods and chattels is of the opinion that they are of a perishable nature and in danger of immediate waste or decay, such sheriff or other officer shall demand that the plaintiff in such attachment obtain from the court out of which the attachment issued an order permitting such property to be sold not later than 24 hours after the levy has been made, upon due notice of sale to the defendant and to the public as the court in its order shall require. The money arising from such sale shall be liable to the judgment obtained upon such attachment, and deposited in the hands of the clerk of the court to which the process is returnable.

If the plaintiff in the attachment fails or refuses to obtain such an order for sale of perishable property, the sheriff or other officer making the levy shall be absolved of all responsibility to any person for loss occasioned by



the failure to sell or care for such perishable property. The demand of the sheriff or other officer shall be written and shall be delivered to the plaintiff or his attorney or agent, and to the defendant if found. If defendant is not found, a copy of the demand shall be posted on the premises where the perishable items are located. Plaintiff's motion for an order of sale of perishable property shall be treated as an emergency motion.

21. Garnishment.] § 21. The sheriff or any other person authorized to serve writs of summons shall, in like manner as writs of summons are served in ordinary civil cases, summon, wherever they may be found in the State, the persons mentioned in such attachment writ as garnishees and all other persons whom the creditor shall designate as having any property, effects, choses in action or credits in their possession or power, belonging to the defendant, or who are in anywise indebted to such defendant, the same as if their names had been inserted in such writ. The persons so summoned shall be considered as garnishees. The return shall state the names of all persons so summoned, and the date of such service on each.

Persons summoned as garnishees shall thereafter hold any property, effects, choses in action or credits in their possession or power belonging to the defendant which are not exempt, subject to the court's order in such proceeding, and shall not pay to the defendant any indebtedness owed to him subject to such order, and such property, effects, choses in action, credits and debts shall be considered to have been attached and the plaintiff's claim to have become a lien thereon pending such suit. A security which is transferable as provided in Section 8-320 of the Uniform Commercial Code[1] is, for purposes of this Act,

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[1]Chapter 26, § 8-320.

only in the possession or power of the person which carries on its books an account in the name of the defendant in which is reflected an interest in such security, or, if such security has been pledged by the defendant, the pledgee of the defendant.

22. Notice by publication and mail.] § 22. When it shall appear by the affidavit filed or by the return of the officer, that a defendant in any attachment suit is not a resident of this State, or the defendant has departed from this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him, and that property of the defendant has been attached, or that persons having such property or effects, choses in action or credits belonging to defendant, or owing debts to him, have been summoned as garnishees, it shall be the duty of the clerk of the court in which the suit is pending to give notice, by publication at least once in each week for three weeks successively, in some newspaper published in this State, most convenient to the place where the court is held, of such attachment or garnishment, and at whose suit, against whose estate, for what sum, and before what court the same is pending, and that unless the defendant shall appear, give bail, and plead within the time limited for his appearance in such case, judgment will be entered, and the estate so attached or garnisheed sold or otherwise disposed of as provided by law. And such clerk shall, within ten days after the first publication of such notice, send a copy thereof by mail, addressed to such defendant, if the place of residence is stated in such affidavit; and the certificate of the clerk that he has sent such notice in pursuance of this section, shall be evidence of that fact.



23. Default.] § 23. No default or proceeding shall be taken against any defendant not served with summons within the State and not appearing, unless the first publication or personal service outside of the State be at least thirty days prior to the day at which such default or proceeding is proposed to be taken.

24. Continuance for want of publication or service.] § 24. If for want of due publication or service the cause shall be continued, the same proceedings shall be had at a subsequent return day to be fixed by the court, as might have been had at the return day at which the writ is returnable.

25. Filing of complaint — Answer or appearance — Time.] § 25. The complaint shall be filed ten days before the return day of the attachment, and if so filed the defendant, subject to the provisions of Section 10 of this Act,[1] shall file his answer or otherwise make his appearance on or before said day. If the complaint is not so filed the defendant shall not be compelled to appear or answer until fifteen days after the return day designated in the writ and if the complaint is not filed five days after the return day designated in the writ the defendant may, in the discretion of the court have the suit dismissed.

26. Civil Practice Act — Application.] § 26. The provisions of the Civil Practice Act, including the provisions for appeal, and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act.

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[1]Section 10 et seq. of this chapter.

27. Pleadings.] § 27. The defendant may answer, traversing the facts stated in the affidavit upon which the attachment issued, which answer shall be verified by affidavit; and if, upon the trial thereon, the issue shall be found for the plaintiff, the defendant may answer the complaint or file a motion directed thereto as in other cases, but if found for the defendant, the attachment shall be quashed, and the costs of the attachment shall be adjudged against the plaintiff, but the suit shall proceed to final judgment as though commenced by summons.

28. Amendments.] § 28. [Omitted]

29. Interpleading.] § 29. In all cases of attachment, any person, other than the defendant, claiming the property attached, or garnisheed may intervene, verifying his petition by affidavit, without giving bond, but such property shall not thereby be replevied; and the court shall immediately (unless good cause be shown by either party for a continuance) direct a jury to be impaneled to inquire into the right of the property. In all cases where the jury finds for the claimant, and that such claimant is also entitled to the possession of all or any part of such property, the court shall enter judgment for such claimant accordingly and order the property attached or garnisheed to which such claimant is entitled to be delivered to such claimant, and the payment of his costs in such action. In cases where the jury finds for a claimant but further find that such claimant is not then entitled to the possession of any such property such claimant shall be entitled to his costs; and where the jury find for the plaintiff in the attachment, such plaintiff shall recover his cost against such claimant. If such claimant is a non-resident of the State he shall file security for costs as in case of non-resident plaintiff.



30. Counterclaim.] § 30. Any defendant against whom an attachment may be sued out under this Act, may avail himself in his defense of any counter-claim properly pleadable by the laws of this State.

31. § 31. Repealed]

31a. Change of parties — Other amendments.] § 31a. [Omitted]

32. § 32. Repealed]

33. Proceedings in aid.] § 33. Upon the return of attachments issued in aid of actions pending, unless it shall appear that the defendant or defendants have been served with process in the original cause, notice of the pendency of the suit, and of the issue and levy of the attachment, shall be given as is required in cases of original attachment; and such notification shall be sufficient to entitle the plaintiff to judgment, and the right to proceed thereon against the property and estate attached, and against garnishees, in the same manner and with like effects as if the suit had been commenced by attachment.

34. Effect of judgment.] § 34. When the defendant has been served with the writ, or appears to the action, the judgment shall have the same force and effect as in suits commenced by summons; and execution may issue thereon, not only against the property attached, but the other property of the defendant.

35. Judgment by default — Special execution.] § 35. When the defendant shall be notified as aforesaid, but not served with process within the State, and shall not appear and answer the action, judgment by default may be entered, which may be proceeded upon to final judgment as in other cases of default, but in no case shall judgment be rendered against the defendant for a greater sum than appears, by the affidavit of the plaintiff, to have been

due at the time of obtaining the attachment, with interest, damages and costs; and such judgment shall bind, and a special execution shall issue against the property, credits and effects attached, and no execution shall issue against any other property of the defendant; nor shall such judgment be any evidence of debt against the defendant in any subsequent suit.

36. Property levied upon.] § 36. [Omitted]

37. Division of proceeds — Priority.] § 37. [Omitted]

38. Statement of participating judgments — Officer to divide proceeds.] § 38. [Omitted]

39. Payment into court.] § 39. [Omitted]

39a. Sale of livestock levied upon.] § 39a. [Omitted]

40. Appeals.] § 40. The plaintiff or defendant in any attachment, person intervening, and the sheriff, or either of them, who may feel aggrieved by the final order or judgment of the court, may prosecute appeals as by law is provided in other civil cases.

41. Fraud.] § 41. This act shall be construed in all courts in the most liberal manner for the detection of fraud.

42. Repeal.] § 42. [Omitted]

43. Repealed]

44. Amendment to pleadings. § 44. [Omitted]



## APPENDIX E

Illinois Revised Statutes 1973, Chapter 23:

**11—21. § 11—21. Fraud—Penalty.)** Any person who by means of any false statement, willful misrepresentation, or failure to notify the county department or the local government unit, as the case may be, of a change in his status as required by sections 11—18 and 11—19, for the purpose of preventing the denial, cancellation or suspension of his grant, or a variation in the amount thereof, or through other fraudulent device obtains or attempts to obtain, or aids or abets any person in obtaining financial aid under this Code to which he is not entitled, shall be guilty of a Class A misdemeanor.

If an applicant makes and subscribes an application form under Section 11—15 which contains a written declaration that it is made under penalties of perjury, knowing it to be false, incorrect or incomplete in respect to any material statement or representation bearing on his eligibility, income or resources, the offender shall be subject to the penalties for perjury as provided in Section 32—2 of the "Criminal Code of 1961", approved July 28, 1961, as amended.[1]

A person who receives financial aid for which he was not eligible as a result of his making any false statement, wilful misrepresentation, or failure to notify the county department or local governmental unit, as the case may be, of a change in his status as required by Sections 11—18 and 11—19, for the purpose of preventing the denial, cancellation or suspension of his grant, or a variation in the amount thereof, or by other fraudulent device, or a person who knowingly aids or abets any person in obtaining financial aid for which he is not eligible, shall be answerable to the county depart-

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1. Chapter 38, § 32—2.

ment or the local government unit, as the case may be, for refunding the entire amount of aid received. If the refund is not made, it shall be recoverable in a civil action from the person who received the aid, or from anyone who wilfully aided such person to obtain the aid. If fraud is proven in such action, the court may as a penalty assess an additional sum of money, up to but not in excess of the entire amount of aid provided, against the recipient or against any person who wilfully aided the recipient. If assessed, the penalty shall be included in any judgment entered for the aid received, and paid to the county department or the local governmental unit, as the case may be.

Supreme Court, U. S.
FILED
AUG 27 1976
MICHAEL RODAK, JR., CLERK

# APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-1407

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JAMES TRAINOR, et al.,

*Appellants.*

v.

JUAN HERNANDEZ, et al.

*Appellees.*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

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**APPEAL DOCKETED APRIL 3, 1976**

**PROBABLE JURISDICTION NOTED JUNE 7, 1976**

KEENAN PRINTING COMPANY (312) 372-0066 365

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**APPENDIX**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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**No. 75-1407**

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JAMES TRAINOR, et al.,

*Appellants.*

v.

JUAN HERNANDEZ, et al.

*Appellees.*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

**APPEAL DOCKETED APRIL 3, 1976**

**PROBABLE JURISDICTION NOTED JUNE 7, 1976**

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

12/ 2/74 Filed complaint.

12/ 5/74 Filed motion for temporary restraining order.

12/ 5/74* Filed memorandum in opposition [to motion for a temporary restraining order].

3/ 3/75 Filed defendants Trainor's and O'Malley's motion to dismiss.

3/ 6/75 Filed plaintiffs' motion for summary judgment.

3/ 7/75 Enter order dated March 6, 1975: [O]rdered that State's Attorney is permitted to adopt motion to dismiss filed by Attorney General and further that Morgan Finley is substituted in place of Matthew Danaher.

3/21/75 Filed designation of three-judge court, consisting of the Honorable Wilbur F. Pell, Jr., the Honorable Joel M. Flaum and the Honorable Alfred Y. Kirkland.

7/ 9/75 Enter order dated July 8, 1975: The parties are directed to brief the issue of whether *Huffman* v. *Pursue, Ltd.*, —— U.S. ——, 95 S. Ct. 1200 (March 18, 1975), requires the above captioned cause to be dismissed.

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*Should be "12/12/74".



10/16/75 Enter order dated October 15, 1975: Arguments heard on behalf of and in opposition to, matters pending before three-judge court and ruling is taken under advisement.

11/ 3/75 Enter order dated October 31, 1975: It is hereby ordered, adjudged and decreed that this suit may be maintained as a plaintiff and defendant class action.

12/16/75 Enter order dated December 15, 1975: Enter order of three-judge court. In accordance with this court's memorandum opinion, the court enters judgment pursuant to Rule 58 of F.R.C.P.

12/16/75 Enter order dated December 15, 1975: Enter memorandum opinion of three-judge court.

1/21/76 Filed state defendants' [Trainor and O'Malley] amended motion for a stay of injunction pending appeal.

1/30/76 Filed defendants' [Finley and Elrod] motion to stay injunction pending appeal.

2/ 2/76 Enter order dated January 30, 1976: Motion of defendants Finley and Elrod to adopt pleadings and memoranda filed and to be filed by the state defendants is granted.

2/ 3/76 Filed notice of appeal to the Supreme Court of the United States on behalf of James Trainor and Vivian O'Malley.

2/10/76 Filed notice of appeal to the Supreme Court of the United States on behalf of defendants Morgan Finley and Richard J. Elrod.

2/26/76 Enter order dated February 25, 1976: Defendants' motion for a stay is denied.

6/15/76 Filed certified copy of order of Supreme Court noting probable jurisdiction in this case.

6/30/76** Enter order dated June 30, 1976: In view of the questionable jurisdictional basis for this motion and in view of the fact that the issue raised by this motion may properly be presented to the Supreme Court, this court declines to rule upon plaintiffs' motion to dismiss the county defendants' appeal.

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**This item is not listed on the docket sheet contained in the original record, but is a part of the supplemental record.



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

Filed December 2, 1974

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

*Plaintiffs,*

vs.

MATTHEW J. DANAHER, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICH-J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Acting Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

*Defendants.*

No. 74 C 3473

**COMPLAINT**

**Preliminary Statement**

1. Plaintiffs, individually and on behalf of all other persons similarly situated, seek to have this Court declare

invalid and enjoin the defendants and the defendant class from enforcing the Illinois Attachment Act, Ill. Rev. Stat. ch. 11, § 1 *et seq.* insofar as it permits and authorizes creditors to attach assets of alleged debtors upon mere conclusionary allegation of fraudulent conduct without judicial review and without affording the debtor notice or prior opportunity to be heard, on the ground that this procedure deprives the alleged debtor of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Plaintiffs further seek damages for deprivation of their property pursuant to the Illinois Attachment Act.

## JURISDICTION

2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1983. Declaratory relief is authorized pursuant to 28 U.S.C. §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure.

3. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 since plaintiffs seek an injunction to restrain state officers from the enforcement, operation and execution of statutes of statewide applicability on the ground that said statutes are contrary to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

## PARTIES

4. Plaintiffs, JUAN and MARIA HERNANDEZ, are residents of Chicago, Illinois.

5. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The class is composed of all persons who have



had or may have their property attached without notice or hearing upon the creditor's mere allegation of fraudulent conduct pursuant to the Illinois Attachment Act. The class is so numerous that joinder of all members is impractible; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class, and the parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

6. Defendant MATTHEW J. DANAHER is the duly elected Clerk for the Circuit Court of Cook County, and, as such, is charged with issuing writs of attachment pursuant to the Illinois Attachment Act. Defendant DANAHER is sued individually and pursuant to Rule 23(b)(1)(A) of the Federal Rules of Civil Procedure as a representative of all persons who are clerks of the circuit courts for the judicial circuits of Illinois. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the defenses of the representative parties are typical of the defenses of the class; the representative parties will fairly and adequately protect the interests of the class; and the prosecution of separate actions against the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class.

7. Defendant RICHARD J. ELROD is the duly elected sheriff of Cook County and, as such, is charged with the execution of writs including writs of attachment issued

pursuant to the Illinois Attachment Act. Defendant ELROD is sued individually and, pursuant to Rule 23(b)(1)(A) of the Federal Rules of Civil Procedure as a representative of all county sheriffs of Illinois. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the defenses of the representative parties are typical of the defenses of the class; the representative parties will fairly and adequately protect the interests of the class; and the prosecution of separate actions against the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class.

8. Defendant JAMES TRAINOR is the Acting Director of the Illinois Department of Public Aid and is charged with the statewide administration of the Department of Public Aid, and, as such, authorizes the filing of writs of attachment pursuant to the Illinois Attachment Act.

9. Defendant VIVIAN O'MALLEY is the duly authorized agent and representative of the Illinois Department of Public Aid and, as such, applies for and obtains writs of attachment pursuant to the Illinois Attachment Act.



## STATEMENT OF FACTS

10. On or about October 30, 1974, Defendant JAMES TRAINOR, by and through his agents pursuant to §§1 and 2 of the Illinois Attachment Act, caused a complaint and affidavit to be filed against the plaintiffs in the Circuit Court of Cook County. Said complaint and affidavit were sworn to and verified by Defendant VIVIAN O'MALLEY and set forth the unsupported allegation that Plaintiffs JUAN and MARIA HERNANDEZ "within two years prior to the filing of this affidavit fraudulently concealed or disposed of property so as to hinder or delay their creditors." (A copy of the complaint and affidavit is attached hereto as plaintiffs' ExhibitA)

11. Upon the filing of said complaint and affidavit Defendant DANAHER summarily issued a writ of attachment and summons pursuant to §§ 1, 2, and 6 of the Illinois Attachment Act directing the Sheriff of Cook County to attach funds in plaintiffs' accounts held by E. J. Brach and Sons, Inc. Credit Union (hereinafter "Credit Union"). (A copy of said Writ of Attachment and Summons is attached hereto as plaintiffs' Exhibit B)

12. On November 5, 1974, Defendant ELROD, by and through his agents, pursuant to §§ 8, 10, and 14 of the Illinois Attachment Act executed said writ of attachment by serving same on the Credit Union.

13. On November 8, 1974, plaintiffs were served with a copy of the complaint, affidavit and writ of attachment.

14. On November 11, 1974, Plaintiff JUAN HERNANDEZ attempted to withdraw funds from the above account in order to pay outstanding debts immediately due and payable. Plaintiff was then informed by an employee of the Credit Union that he could not withdraw his funds since they had been attached.

15. On November 18, 1974, the return date set forth in the writ of attachment and summons, Plaintiff JUAN HERNANDEZ and his attorney appeared with an affidavit and answer to the attachment and demanded an immediate hearing. They were informed that the matter was set for hearing on December 19, 1974. They were further informed that attachment cases are not heard until three or four weeks subsequent to the return date.

**STATEMENT OF CLAIM**

16. The Illinois Attachment Act, Ill. Rev. Stat., ch. 11, §1 *et seq.* is contrary to and violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution for the following reasons:

a) Said statutes authorize the taking of an alleged debtor's property without notice and an opportunity to be heard;

b) § 1, parts sixth through ninth, authorizes a creditor to obtain a writ of attachment upon any of the following allegations, without supporting facts or other evidence:

Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.

Where the debtor has, within two years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.

Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.

Where the debt sued for was fraudulently contracted on the part of the debtor: Provided, the statement of the debtor, his agent or attorney,



which constitute the fraud, shall have been reduced to writing, and his signature attached thereto, by himself, agent or attorney.

c) §§ 1 and 2 authorize a creditor to obtain a writ of attachment upon his *ex parte* application to the clerk of the circuit court and without judicial order or supervision;

d) §§ 1 and 2 authorize the issuance of a writ of attachment without prior notice and opportunity to be heard whether or not the creditor has a security interest in the property and whether or not the action sounds in contract or tort;

e) The statute fails to provide for an immediate post-attachment hearing and § 6 specifically permits the creditor to select a return date up to 60 days subsequent to issuance of the writ.

17. Defendants and members of defendant class separately and in concert have acted under color of Ill. Rev. Stat. ch. 11, § 1 *et seq.* to deprive plaintiffs, and members of the plaintiffs' class, of rights secured under the Constitution of the United States in that plaintiffs and members of the plaintiffs' class have been deprived of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Title 42, U.S.C. § 1983.

18. As a direct and proximate result of defendants' wrongful actions, plaintiffs have been damaged in the amount of $10,000.

19. Plaintiffs and the class they represent have no adequate remedy at law and have suffered and continue to suffer irreparable injury as a result of the application of the statutory provisions herein challenged.

## PRAYER FOR RELIEF

WHEREFORE, plaintiffs, individually and on behalf of all others similarly situated, pray that this Court grant the following relief:

A. Convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 to determine this action.

B. Order that this action be maintained as a class action as to both the plaintiff class and the defendant classes pursuant to Rule 23 of the Federal Rules of Civil Procedure.

C. Declare that Ill. Rev. Stat., ch. 11, §§ 1, 2, 2a, 6, 8, 10, and 14 are invalid and unconstitutional on their face and as applied for the reason that they violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

D. Enter a temporary restraining order and preliminary and permanent injunctions enjoining defendants from refusing to dismiss the writ of attachment against the plaintiffs' property.

E. Enter a temporary restraining order and preliminary and permanent injunctions mandating the defendants to return plaintiffs' property attached pursuant to the writ of attachment.

F. Enter preliminary and permanent injunctions enjoining Defendant MATTHEW J. DANAHER and all other clerks for the judicial circuits of Illinois, their successors, agents and employees, from issuing writs of attachment upon a creditor's affidavit of fraud pursuant to Ill. Rev. Stat. ch. 11, § 1, parts sixth through ninth.

G. Enter preliminary and permanent injunctions enjoining Defendant RICHARD J. ELROD and all other county sheriffs of the State of Illinois, their successors,



agents and employees, from executing writs of attachment issued upon a creditor's affidavit of fraud pursuant to Ill. Rev. Stat. ch. 11, § 1, parts sixth through ninth.

H. Enter preliminary and permanent injunctions enjoining Defendants JAMES TRAINOR and VIVIAN O'MALLEY from authorizing and processing applications for writs of attachments pursuant to Ill. Rev. Stat. ch. 11, § 1, parts sixth through ninth.

I. Enter judgment for the Plaintiffs JUAN and MARIA HERNANDEZ and against each of the defendants in the amount of $10,000 plus the costs of this action.

J. Award the plaintiffs reasonable attorneys' fees.

K. Grant such other relief as this court may deem appropriate and just.

/s/ Fred L. Lieb

/s/ Alan Dockterman

[Names and addresses of counsel omitted in printing.]

## PLAINTIFFS' EXHIBIT "A" TO THE COMPLAINT*

**Attachment Complaint**

**In the Circuit Court of Cook County, Illinois**
**Municipal Department, First District**

People of the State of Illinois ex rel. Illinois Department of Public Aid

*Plaintiff,*

*v.*

Juan Hernandez and Maria Hernandez,

*Defendants.*

E. J. Brach and Sons Inc. Credit Union,

*Attachment Debtor.*

No. 74M1-576
Amount claimed
$3,720.20
Return date
November 18, 1974

---

*Plaintiffs' exhibits "A" and "B" (pages 14-23 of this appendix) consist of the attachment complaint, affidavit of attachment, and writ of attachment, which are a part of the record of the attachment suit brought against plaintiffs in the state court. These three documents were prepared on printed forms, supplied by the Clerk of the Circuit Court of Cook County, Illinois.



### COMPLAINT

The plaintiff claims as follows:

1. That the defendants Juan Hernandez and Maria Hernandez within two years preceeding the filing of this affidavit fraudulently concealed from Cook County Department of Public Aid, agent of the plaintiff herein, personal property in the form of monies on deposit, to their credit, in the E. J. Brach and Sons Inc. Credit Union.

2. That as a result of such fraudulent concealment by the defendants herein, the plaintiff through its agent Cook County Department of Public Aid was obliged to and did provide public assistance to them, at their request, for the period April 17, 1972 through February 13, 1973 in the total sum of $3,720.20 to which they were not entitled.

3. That the defendants herein still have personal property in the form of monies on deposit to their credit in the E. J. Brach and Sons Inc. Credit Union to-wit: Juan Hernandez under Account No. 583056 with a current balance of approximately $593.31 and Maria Hernandez under Account No. 73787439 with a current balance of approximately $8.07.

Wherefore plaintiff prays for entry of a Judgment in the sum of $3,720.20 together with all costs herein and for such other and further relief as this Court may deem fit to grant.

.....
Attorney General
160 North LaSalle Street
793-2565

*Attorney for plaintiff.*

I, Vivian M. O'Malley, make oath and say that I am duly authorized agent of, the plaintiff in the above entitled action, have full knowledge of the facts relating to the above statement of claim and the facts therein alleged are true.

.....

Signed and sworn to before me,

.....

.....19....

*Notary public*



**Affidavit for Attachment**

**In the Circuit Court of Cook County, Illinois**
**Municipal Department, First District**

Vivian W. O'Malley, duly authorized representative of the plaintiff, being duly sworn, says: That there is due the plaintiff Illinois Department of Public Aid from the defendants Juan Hernandez and Maria Hernandez upon the claim set forth in the complaint hereto attached, after allowing the defendants all just credits, deductions and set-offs, the sum of $3,720.20

And affiant further says:

1. That the defendants Juan Hernandez and Maria Hernandez, residents of this State and their place of residence as follows: 854 N. Avers, Chicago, Illinois.

1(a) *The defendant ..... ..... not resident ..... of this State and upon diligent inquiry affiant has not been able to ascertain ..... ..... place ..... of residence.

1(b) The defendant ..... conceal .....sel ..... or stand ..... in defiance of ..... officer ..... so that process cannot be served upon .....

1(c) The defendant ..... ..... departed from this State with the intention of having .....effects removed from this State.

---

*Paragraphs 1(a) through 1(i) correspond to the nine grounds for attachment set out in Illinois Revised Statutes, chapter 11, section 1. Paragraph 1(g) reflects the basis for the attachment suit against the named plaintiffs, and thus, is the only paragraph where the blank spaces have been filled in.

1(d) The defendant ..... ..... about to depart from this State with the intention of having ..... effects removed from this State.

1(e) The defendant ..... ..... about to remove ..... property from this State with the intention of injurying the plaintiff .....

1(f) The defendant ..... ..... within two years preceding the filing of this affidavit fraudulently conveyed or assigned ..... ..... effects, or a part thereof, so as to delay or hinder ..... creditors.

1(g) The defendants Juan Hernandez and Maria Hernandez within two years preceding the filing of this affidavit fraudulently concealed or disposed of property so as to hinder or delay their creditors.

1(h) The defendant ..... ..... about fraudulently to conceal, assign or otherwise dispose of ..... property or effects so as to hinder or delay ..... creditors.

1(i) The debt sued for was fraudulently contracted on the part of the defendant ..... and statements of ..... ..... agent ..... or attorney, which constitute the fraud, have been reduced to writing and ..... signature ..... attached thereto, by ..... sell ..... agent ..... or attorney .....

2. The action herein does not sound in Tort.

3. The plaintiff claims $3,720.20 and a writ of attachment against the property of the defendants Juan Hernandez and Maria Hernandez which property is of the value of approximately $602.00 and no more, and is described as follows:



Account No. 583056 in the name of Juan Hernandez in the E. J. Brach & Sons Inc. Credit Union, and Account No. 73787439 in the name of Maria Hernandez in the E. J. Brach & Sons Inc. Credit Union; and any and all accounts in the E. J. Brach & Sons Inc. Credit Union in the name of Juan Hernandez and/or Maria Hernandez.

4. Affiant further says that he has just reason to believe that E. J. Brach and Sons Inc. Credit Union indebted to the defendants herein or have property, effects, chooses in action or credits in its possession or power, belonging to the defendants.

WHEREFORE, this affiant prays that said E. J. Brach and Sons Inc. Credit Union may be summoned as attachment debtor agreeably to law and may be required to file with the clerk of the court answers under oath to the interrogatories hereto attached.

The Clerk of the court is hereby requested to issue summons in the usual form requiring the appearance of the defendant and attachment debtor at or before 9:30 A.M., on November 18, 1974.

.....
*Affiant*

as duly authorized representative of
Illinois Department of Public Aid

Signed and sworn to before me,
....., 19...

.....
*Notary public*

Order Fixing Amount of Bond**

The Court orders that a writ herein should issue for damages in the amount of $.....

Dated ....., 19.....

.....
*Judge*

**FOR USE IN TORT ACTION, GARNISHMENT AND CASES WHERE SPECIFIC PROPERTY TO BE ATTACHED IS DESCRIBED, WHICH WOULD WARRANT A BOND IN AN AMOUNT OTHER THAN DOUBLE THE SUM SWORN TO BE DUE.

Important

THE BLANKS OF THE GROUNDS OF ATTACHMENT RELIED UPON MUST BE FILLED IN AND LINES DRAWN THROUGH THOSE NOT APPLICABLE.

[Interrogatories to attachment debtor omitted in printing.]



**PLAINTIFFS' EXHIBIT "B" TO THE COMPLAINT**

**Writ of Attachment**

**In the Circuit Court of Cook County, Illinois**
**Municipal Department, First District**

| | |
|---|---|
| People of the State of Illinois ex rel. Illinois Department of Public Aid<br>*Plaintiff,*<br>*v.*<br>Juan Hernandez and Maria Hernandez,<br>*Defendants.*<br>E. J. Brach and Sons Inc. Credit Union,<br>*Attachment Debtor.* | No. 74M1-576<br>Amount claimed $3,720.20<br>Return date November 18, 1974 |

Writ of Attachment and Summons

THE PEOPLE OF THE STATE OF ILLINOIS to the Sheriff of Cook County.

WHEREAS Illinois Department of Public Aid by William J. Scott, Attorney General of State of Illinois, hath complained that Juan Hernandez and Maria Hernandez is [sic] justly indebted to the said Illinois Department of Public Aid in the amount of Three Thousand Seven Hundred & Twenty Dollars and .20/100 Cents and that the defendants Juan Hernandez and Maria Hernandez within two years preceding the filing of this affidavit in the above entitled

case, fraudulently concealed their property so as to hinder or delay their creditors and the said Illinois Department of Public Aid is a State agency and exempt of bond and security, according to law: WE THEREFORE COMMAND you that you attach so much of the estate, real or personal of the said defendants Juan Hernandez & Maria Hernandez as may be found in said city of Chicago, as shall be of value sufficient to satisfy the said claim and costs, according to the complaint and affidavit, but in case any specific property of the said defendants Juan Hernandez and Maria Hernandez found in your city, shall be described in this writ, then shall attach said described property only, and no other property, the said specified property to be so attached, being described as follows:

> Account No. 583056 in the name of Juan Hernandez in the E. J. Brach and Sons Inc. Credit Union, and Account No. 73787439 in the name of Maria Hernandez in the E. J. Brach and Sons Inc. Credit Union and any and all accounts in the E. J. Brach & Sons Inc. Credit Union in the name of Juan Hernandez and/or Maria Hernandez.

and such estate so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon, according to law; and that you summon the said defendants Juan Hernandez and Maria Hernandez to either appear in person before said court in the above entitled action at Room No. 1308, Chicago Civic Center, Chicago, Illinois, at 9:30 A.M., on November 18, 1974, and file their appearance in writing with the clerk of the court or cause their appearance in writing by themselves or attorney to be entered in said action at or before that time in the office of the Clerk of the Court in Room 602, in said Chicago Civic Center, to answer to the complaint of the above named plaintiff, a copy of which



is hereto attached; and that you also summon E. J. Brach and Sons Inc. Credit Union a garnishees requiring them to file with the clerk of the court at Room 602, in said Chicago Civic Center at 9:30 A.M. on November 18, 1974, or before that time their answers in writing to the interrogatories, submitted.

William J. Scott, Attorney General
Attorney for plaintiff
160 North LaSalle Street
Chicago, Illinois 60601
793-3656

WITNESS .....19....

Oct. 30, 1974 Matthew J. Danaher
Clerk of Court

NOTICE

Proceedings in attachment are disposed of in Room 1308, Chicago Civic Center on return day unless otherwise ordered by the Court.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

Filed December 5, 1974
[Caption omitted in printing]

**PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER**

NOW COME Plaintiffs JUAN and MARIA HERNANDEZ, by and with their attorneys, and respectfully move this Honorable Court for an order temporarily restraining the Defendants JAMES TRAINOR and VIVIAN O'MALLEY from refusing to release the writ of attachment on Account Number 583056 and Account Number 73787439 on deposit with E. G. Brach and Sons, Inc. Credit Union and for an order mandating Defendant RICHARD J. ELROD to release custody and control of said assets.

In support of their motion, plaintiffs submit the attached affidavit and a supporting memorandum of law.

/s/ Fred L. Lieb
One of Plaintiffs Attorneys

[Names and addresses of counsel omitted in printing]

STATE OF ILLINOIS }
COUNTY OF COOK } SS

AFFIDAVIT

1. I and my wife are the plaintiffs in the above-captioned cause.

2. We presently reside in Chicago, Illinois with our four minor children: ages 5, 6, 8 and 9.



3. I am employed at E. J. Brach and Sons as a laborer and am a member of the E. J. Brach and Sons Inc. Credit Union.

4. On November 8, 1974, I was served by a Deputy Sheriff of Cook County a copy of a complaint, affidavit and writ of attachment.

5. On November 11, 1974, I attempted to withdraw funds from my account with the credit union but was informed that I could not because the monies had been attached by the Department of Public Aid.

6. On November 18, 1974, I appeared with my attorney, Alan Dockterman, in the Circuit Court of Cook County, in room 1401 of the Civic Center. I and my attorney were ready to proceed with the hearing and to challenge the attachment at that time, but when we arrived we learned the case had already been continued to December 19, 1974.

7. I presently have no other savings and need the money in my account with the Credit Union to pay my rent which is due December 1, 1974, and to pay past due electricity, gas, and telephone bills. If I cannot obtain money to pay these bills, I fear that these services will be discontinued.

8. I am presently in need of surgery on my back but cannot leave my job to go into the hospital because I cannot use the money in my account with the Credit Union to support my family and pay my bills, while I am out of work.

9. My automobile is presently being repaired by Empire Motors because of a recent accident. I have been informed that the bill will be approximately $200.00.

/s/ Juan Hernandez

[Jurat omitted in printing]

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

Filed December 12, 1974

**EXHIBITS TO DEFENDANTS' MEMORANDUM OPPOSING MOTION FOR A TEMPORARY RESTRAINING ORDER**

**EXHIBIT A**

**Illinois Revised Statutes, chapter 23—Charities and Public Welfare.**

11—21. § 11—21. **Fraud—Penalty.**) Any person who by means of any false statement, wilful misrepresentation, or failure to notify the county department or the local governmental unit, as the case may be, of a change in his status as required by sections 11—18 and 11—19, for the purpose of preventing the denial, cancellation or suspension of his grant, or a variation in the amount thereof, or through other fraudulent device obtains or attempts to obtain, or aids or abets any person in obtaining financial aid under this Code to which he is not entitled, shall be guilty of a Class A misdemeanor.

If an applicant makes and subscribes an application form under Section 11—15 which contains a written declaration that it is made under penalties of perjury, knowing it to be false, incorrect or incomplete in respect to any material statement or representation bearing on his eligibility, income or resources, the offender shall be subject to the penalties for perjury as provided in Section 32—2 of the "Criminal Code of 1961", approved July 28, 1961, as amended.[1]



A person who receives financial aid for which he was not eligible as a result of his making any false statement, wilful misrepresentation, or failure to notify the county department or local governmental unit, as the case may be, of a change in his status as required by Sections 11—18 and 11—19, for the purpose of preventing the denial, cancellation or suspension of his grant, or a variation in the amount thereof, or by other fraudulent device, or a person who knowingly aids or abets any person in obtaining financial aid for which he is not eligible, shall be answerable to the county department or the local governmental unit, as the case may be, for refunding the entire amount of aid received. If the refund is not made, it shall be recoverable in a civil action from the person who received the aid, or from anyone who wilfully aided such person to obtain the aid. If fraud is proven in such action, the court may as a penalty assess an additional sum of money, up to but not in excess of the entire amount of aid provided, against the recipient or against any person who wilfully aided the recipient. If assessed, the penalty shall be included in any judgment entered for the aid received, and paid to the county department or the local governmental unit, as the case may be.

---

1. Chapter 38, § 32—2.

## EXHIBIT B TO DEFENDANTS' MEMORANDUM OPPOSING MOTION FOR A TEMPORARY RESTRAINING ORDER

**Illinois Revised Statutes, chapter 11—Attachments:**

AN ACT in regard to attachments. Approved December 23, 1871. Title as amended by act approved Aug. 24, 1965. L. 1965, p. 3323.

*Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

1. Causes.] § 1. In any court having competent jurisdiction, a creditor having a money claim, whether liquidated or unliquidated, and whether sounding in contract or tort, may have an attachment against the property of his debtor, or that of any one or more of several debtors, either at the time of instituting suit or thereafter, when the claim exceeds $20, in any one of the following cases:

First: Where the debtor is not a resident of this State.

Second: When the debtor conceals himself or stands in defiance of an officer, so that process cannot be served upon him.

Third: Where the debtor has departed from this State with the intention of having his effects removed from this State.

Fourth: Where the debtor is about to depart from this State with the intention of having his effects removed from this State.

Fifth: Where the debtor is about to remove his property from this State to the injury of such creditor.

Sixth: Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.



Seventh: Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.

Eighth: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.

Ninth: Where the debt sued for was fraudulently contracted on the part of the debtor: Provided, the statements of the debtor, his agent or attorney, which constitute the fraud, shall have been reduced to writing, and his signature attached thereto, by himself, agent or attorney.

1a. Venue.] § 1a. The venue provisions applicable to other civil cases shall apply to attachment proceedings; and in addition thereto, attachment proceedings may be brought in the County where property or credits of the debtor are found.

2. Affidavit — Statement — Examination under oath.] § 2. To entitle a creditor to such a writ of attachment, he or his agent or attorney shall make and file with the clerk of the circuit court, an affidavit setting forth the nature and amount of the claim, so far as practicable, after allowing all just credits and set-offs, and any one or more of the causes mentioned in section 1, and also stating the place of residence of the defendants, if known, and if not known, that upon diligent inquiry the affiant has not been able to ascertain the same together with a written statement, either embodied in such affidavit or separately in writing, executed by the attorney or attorneys representing the creditor, to the effect that the attachment action invoked by such affidavit does or does not sound in tort, also a designation of the return day for the summons to be issued in said action. In all actions

sounding in tort, before the writ of attachment shall be issued, the plaintiff, his agent or attorney, shall apply to a judge of the circuit court of the county in which the suit is to be brought or is pending and be examined, under oath, by such judge concerning the cause of action; and, thereupon, such judge shall indorse upon the affidavit the amount of damages for which the writ shall issue, and no greater amount shall be claimed.

2a. Form of affidavit.] § 2a. Affidavits for attachment before courts may be substantially in the following form:

STATE OF ILLINOIS, )
) ss.
..... County )

A B, being duly sworn, says: That (here state if affiant is agent or attorney of the creditor; if suit is by an individual or corporation, the name of such individual or corporation, and if the suit is by a firm, the name of the partners) has a just demand against (name of debtor), on account of (here make short statement of the nature and amount of the claim), and the affiant believes (the name of the creditor) is entitled to recover of said (name of debtor), after allowing all just credits and set-offs ..... dollars and ..... cents, which is now due, and that he has good reason to believe and does believe that (name of debtor) (here state some one or more of the causes which authorize an attachment) the said (name of debtor) (here state the residence of the debtor if known, or if not, that the affiant has made diligent inquiry and cannot ascertain his place of residence.)



.....

Subscribed and sworn to before me on this ..... day of ....., ....., A.D.

.....

My commission expires ....., ....., A. D.

(If action sounds in tort here include the endorsement of judge as to amount of damages for which writ shall issue.)

3. Names, etc., heirs, etc.] § 3. It shall be sufficient, in all cases of attachment, to designate defendants by their reputed names, by surnames, and joint defendants by their separate or partnership names, or by such names, styles or titles as they are usually known; and heirs, executors and administrators of deceased defendants shall be subject to the provisions of this act, in all cases in which it may be applicable to them.

4. § 4. Repealed.

4a. Bond — State and its departments and officers exempt.] § 4a. Before granting an attachment, as aforesaid, the clerk shall take bond and sufficient security, payable to the People of the State of Illinois, for the use of the person or persons interested in the property attached, in double the sum sworn to be due, conditioned for satisfying all costs which may be awarded to such defendant, or to any others interested in said proceedings, and all damages and costs which shall be recovered against the plaintiff, for wrongfully suing out such attachment — which bond, with affidavit of the party complaining, or his agent or attorney, shall be filed in the office of the clerk granting the attachment. Every attachment issued without a bond and affidavit taken, is hereby declared illegal and void, and shall be dismissed: Provided, however, that

nothing herein contained shall be construed to require the State of Illinois, or any Department of Government thereof, or any State officer, to file a bond as plaintiff in any proceeding instituted under this Act.

4b. Court may fix bond in double value of property to be attached.] § 4b. The court, or a judge thereof, upon ex parte motion, without notice, supported by affidavit of the plaintiff, his agent or attorney, substantially describing the property to be attached, and the value thereof, may, if satisfied of the bona fides of the application and sufficiency of the bond under the circumstances of the case, including proposed garnishments, fix the amount of the bond in double the value of the property to be attached, instead of double the sum sworn to be due, and in such event the writ shall direct the officer to attach said specifically described property, but the value of said property to be attached shall not be in excess of an amount sufficient to satisfy the debt claimed and costs. The court may require that said affidavit be supplemented by additional showing, by appraisal or otherwise, as to the value of said property, and may, upon motion of any party to the action claiming an interest in said property, either before or after actual attachment, require additional security, or order release of the attachment to the extent not covered by adequate double security.

5. Condition of bond.] § 5. The condition of the bond required in the preceding section shall be applicable to alias and pluries writs as well as original writs and shall be substantially in the following form:

The condition of this obligation is such, that whereas the above bounden ..... hath, on the day of the date hereof, prayed an attachment out of the ..... Court of said County, at the suit of .....



against the estate of the above named ..... Now, if the said ..... shall prosecute his suit with effect, or in the case of failure therein shall well and truly satisfy all costs which may be awarded to said ..... or to any person or persons interested in the property attached, and all damages and costs which shall be recovered against the plaintiff for wrongfully suing out the said writ of attachment, or alias or pluries writ or writs of attachment, then the above obligation to be void; otherwise to remain in full force and effect.

Additional bonds shall not be required for the issuance of alias and pluries writs, except as provided in Section 10a of this Act.

6. Writ — Form.] § 6. The writ of attachment required in the preceding section shall be directed to the sheriff (and, for purpose only of service of summons, to any person authorized to serve writs of summons), or in case the sheriff is interested, or otherwise disqualified or prevented from acting, to the coroner of the county in which the suit is commenced, and shall be made returnable on a return day designated by the plaintiff, which day shall not be less than ten days or more than sixty days after its date. Such writ shall be substantially in the following form:

The People of the State of Illinois to the Sheriff of ..... County: or for the purpose only of service as summons; to any person authorized to serve writs of summons: — Greeting:

Whereas A B (or agent or attorney of A B, as the case may be), hath complained that C D is justly indebted to the said A B to the amount of ..... and that (here state the cause set out in the affidavit) and the said ..... having given bond and security, according to law: We therefore command you that you attach so

much of the estate, real or personal, of the said C D, to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the affidavit, but in case any specific property of the said C D, found in your county shall be described in this writ, then you shall attach said described property only, and no other property, the said specified property to be so attached, being described as follows:

.....

.....

and such estate so attached in your hands to secure, or so to provide, that the same may be liable to further proceedings thereupon, according to law; and that you summon C D to appear and answer the complant of said A B, before the ..... ..Court of ..... at ..... in the county of ..... on the ..... day of ..... next; and that you also summon ..... and such other persons as you shall be required by the said A B, as garnishees, to be and appear before the said court on the said ....., day of ..... next, then and there to answer to what may be objected against them. When and where you shall make known to the said court how you have executed this writ, and have you then and there this writ.

Witness ..... clerk of the said court, this ..... day of ..... in the year of our Lord, etc.

Which writ of attachment shall be signed by the clerk, and the seal of the court shall be affixed thereto.

7. Attachment against a joint debtor.] § 7. In all cases where two or more persons are jointly indebted, either as partners or otherwise, and an affidavit shall be filed as provided in the first section of this act, so as to bring one or more of such joint debtors within its provisions,



and amenable to the process of attachment, then the writ of attachment shall issue against the property and the effects of such as are so brought within the provisions of this act; and the officer shall be also directed in said writ to summon, all defendants to the action, whether the attachment is against them or not, to answer to the said action, as in other cases of joint defendants.

8. Execution of writ.] § 8. Such officer shall without delay execute such writ of attachment upon the property described in the writ, or in the absence of such description, upon the lands, tenements, goods, chattels, rights, credits, moneys and effects of the debtor, or upon any lands and tenements in and to which such debtor has or may claim any equitable interest or title, of sufficient value to satisfy the claim sworn to, with costs of suit as commanded in such writ.

Except as provided in Section 11 of this act, the writ of attachment may be levied only in the county to which the writ is issued, and by a proper officer of said county.

9. Certificate of levy—Effect.] § 9. When a writ of attachment is levied upon any real estate, in any case, it shall be the duty of the officer making the levy to file a certificate of such fact with the recorder of the county where such land is situated; and from and after the filing of the same, such levy shall take effect, as to creditors and *bona fide* purchasers, without notice, and not before.

10. Serving defendant — Return.] § 10. The officer shall also serve said writ upon the defendant therein, if he can be found, in like manner as provided for service of summons in other civil cases. The return of such writ shall state the particular manner in which the same was served. If the writ is served upon the defendant less than ten days before the return day thereof, he shall not be compelled to

appear or plead until fifteen days after the return day designated in the writ. The writ of attachment may be served as a summons upon defendants wherever they may be found in the State, by any person authorized to serve writs in like manner as summons in other civil cases.

10a. Alias and pluries writs.] § 10a. (1) When it appears by the return of the officer that the defendant or property of the defendant is not found, or that a garnishee designated by the writ has not been served, alias or pluries writs may issue on the application of the plaintiff.

(2) Alias or pluries writs may also issue on the application of the plaintiff where the property attached on any original alias or pluries writ, or the property found to be in the hands of the garnishee or garnishees, is not of a value sufficient to satisfy the claim sworn to, with costs of suit. The provisions of this sub-section shall not be applicable to cases in which the original writ describes specific property to be attached.

(3) When the attachment writ is directed against specific property of the defendant and only a portion of the property described is attached, or the property found to be in the hands of the garnishee or garnishees, is not of a value sufficient to satisfy the claim sworn to, with costs of suit, alias or pluries writs directed against the remainder of the property described, may issue upon the application of the plaintiff. Alias or pluries writs may also issue where additional specific property is desired to be attached, but before such writ or writs shall issue the plaintiff shall furnish an additional bond in accordance with Section 4b of this Act, in double the value of the additional specific property. Where a writ of attachment covering specific property has been issued, alias or pluries writs may issue on application of the plaintiff directing the sheriff to attach sufficient property of the defendant, which, together with the specific property already attached, if any, will equal the amount of the plaintiff's claim, and before such alias or pluries writ or writs shall issue the plaintiff shall furnish in accordance with Section 4a of this Act an additional bond in amount double the value of the additional property to be attached.



(4) Any alias or pluries writ shall be executed, the defendant shall be served, if he can be found, and return shall be made, and the same proceedings shall be had, as though such alias or pluries writ was original writ.

11. Pursuit of property.] § 11. If the defendant, or any person for him, shall be in the act of removing any personal property, the officer may pursue and take the same in any county in this state, and return the same to the county from which such attachment issued.

12. Writ issued and served on Sunday.] § 12. If it shall appear, by the affidavit, that a debtor is actually absconding, or concealed, or stands in defiance of an officer duly authorized to arrest him on civil process, as aforesaid, or has departed this state with the intention of having his effects and personal estate removed out of the state, or intends to depart with such intention, it shall be lawful for the clerk to issue, and sheriff or other officer to serve, an attachment against such debtor, on a Sunday as on any other day.

13. Writs to other counties.] § 13. The creditor may, at the same time, or at any time before judgment, cause an attachment writ to be issued to any other county in the State where the debtor may have property liable to be attached, which shall be levied as other attachment writs.

14. Possession — Forthcoming bond.] § 14. The officer serving the writ shall take and retain the custody and possession of the property attached, to answer and abide by the judgment of the court, unless the person in whose possession the same is found shall enter into bond and security to the officer, to be approved by him, in double the value of the property so attached with condition that the said estate and property shall be forthcoming to answer the judgment of the court in said suit. The sheriff, or other officer shall return such bond to the court in which the suit is brought, on the day to which such attachment is returnable.

15. Bond or recognizance to pay judgment.] § 15. Any defendant in attachment, desiring the return of property attached, may, at his option, instead of or in substitution for the bond required in the preceding section, give like bond and security, in a sum sufficient to cover the debt and damages sworn to in behalf of the plaintiff, with all interest, damages and costs of suit, conditioned that the defendant will pay the plaintiff the amount of the judgment and costs which may be rendered against him in that suit, on a final trial, within ninety days after such judgment shall be rendered or a recognizance, in substance as aforesaid, may be taken in open court, and entered of record, in which case the court shall approve of the security and the recognizance made to the plaintiff, and upon a forfeiture of such recognizance judgment may be rendered and execution issued as in other cases of recognizance. In either case, the attachment shall be dissolved, and the property taken restored, and all previous proceedings, either against the sheriff or against the garnishees, set aside, and the cause shall proceed as if the defendant had been seasonally served with a writ of summons.



16. Neglect of officer to take bond—Proceedings. ]§ 16. If the sheriff shall fail to return a bond taken by virtue of the provisions of this Act, or shall have neglected to take one when he ought to have done so, in any attachment issued under any provisions of this Act, the plaintiff in the attachment may cause a rule to be entered at any time during the first ten days after the day on which the writ is returnable requiring the said sheriff to return the said bond; or in case no bond has been taken, to show cause why such bond was not taken. If the said sheriff shall not return the said bond within one day thereafter, or show legal and sufficient cause why the said bond has not been taken, judgment shall be entered up against him for the amount of the plaintiff's demand, with costs of suit. Execution may thereupon issue for the same, whenever judgment shall have been entered against the defendant in the attachment.

17. Neglect to return sufficient bond—Proceedings.] § 17. The plaintiff may, within thirty days after the return of such bond, except to the sufficiency thereof, reasonable notice of such exception having been given to the sheriff or other officer who took the same, and if, upon hearing, the court shall adjudge such security insufficient, such sheriff shall be subject to the same judgment and recovery and have the same liberty of defense as if he had been made defendant in the attachment, unless good and sufficient security shall be given within such time as may be directed by the court, and execution may issue thereupon as in other cases of judgment. And whenever the judgment of the plaintiff, or any part thereof shall be paid or satisfied by any such sheriff, he shall have the same remedy against the defendant for the amount so paid by him as is now provided by law for bail against their principal, where a judgment is paid or satisfied by them.

18. Suit on bond.] § 18. If the plaintiff shall not except to the bond taken by the sheriff as aforesaid, or the exceptions are not sustained, and such bond shall be forfeited the plaintiff in the attachment may bring suit thereon in his own name, the same as if such bond had been assigned to him, and judgment shall be given for the plaintiff against the obligors in the bond for the value of the property, or if the property is greater than the amount due upon the execution, then for the amount due and costs of suit.

19. Sustenance of live stock — Compensation.] § 19. When any sheriff or other officer shall serve an attachment on horses, cattle or live stock, and the same shall not be immediately replevied or restored to the debtor, such officer shall provide sufficient sustenance for the support of such live stock until the same shall be sold or discharged from such attachment. He shall receive therefor a reasonable compensation, to be ascertained and determined by the court out of which the attachment issued, and charged in the fee bill of such officer, and shall be collectible as part of the costs.

20. Perishable property.] § 20. When any goods and chattels are levied on by virtue of any attachment, and the sheriff or other officer having custody of such goods and chattels is of the opinion that they are of a perishable nature and in danger of immediate waste or decay, such sheriff or other officer shall demand that the plaintiff in such attachment obtain from the court out of which the attachment issued an order permitting such property to be sold not later than 24 hours after the levy has been made, upon due notice of sale to the defendant and to the public as the court in its order shall require. The money arising from such sale shall be liable to the judgment obtained upon such attachment, and deposited in the hands of the clerk of the court to which the process is returnable.



If the plaintiff in the attachment fails or refuses to obtain such an order for sale of perishable property, the sheriff or other officer making the levy shall be absolved of all responsibility to any person for loss occasioned by the failure to sell or care for such perishable property. The demand of the sheriff or other officer shall be written and shall be delivered to the plaintiff or his attorney or agent, and to the defendant if found. If defendant is not found, a copy of the demand shall be posted on the premises where the perishable items are located. Plaintiff's motion for an order of sale of perishable property shall be treated as an emergency motion.

21. Garnishment.] § 21. The sheriff or any other person authorized to serve writs of summons shall, in like manner as writs of summons are served in ordinary civil cases, summon, wherever they may be found in the State, the persons mentioned in such attachment writ as garnishees and all other persons whom the creditor shall designate as having any property, effects, choses in action or credits in their possession or power, belonging to the defendant, or who are in anywise indebted to such defendant, the same as if their names had been inserted in such writ. The persons so summoned shall be considered as garnishees. The return shall state the names of all persons so summoned, and the date of such service on each.

Persons summoned as garnishees shall thereafter hold any property, effects, choses in action or credits in their possession or power belonging to the defendant which are not exempt, subject to the court's order in such proceeding, and shall not pay to the defendant any indebtedness owed to him subject to such order, and such property, effects, choses in action, credits and debts shall be considered to have been attached and the plaintiff's claim to

have become a lien thereon pending such suit. A security which is transferable as provided in Section 8-320 of the Uniform Commercial Code[1] is, for purposes of this Act, only in the possession or power of the person which carries on its books an account in the name of the defendant in which is reflected an interest in such security, or, if such security has been pledged by the defendant, the pledgee of the defendant.

22. Notice by publication and mail.] § 22. When it shall appear by the affidavit filed or by the return of the officer, that a defendant in any attachment suit is not a resident of this State, or the defendant has departed from this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him, and that property of the defendant has been attached, or that persons having such property or effects, choses in action or credits belonging to defendant, or owing debts to him, have been summoned as garnishees, it shall be the duty of the clerk of the court in which the suit is pending to give notice, by publication at least once in each week for three weeks successively, in some newspaper published in this State, most convenient to the place where the court is held, of such attachment or garnishment, and at whose suit, against whose estate, for what sum, and before what court the same is pending, and that unless the defendant shall appear, give bail, and plead within the time limited for his appearance in such case, judgment will be entered, and the estate so attached or garnisheed sold or otherwise disposed of as provided by law. And such clerk shall, within ten days after the first publication of such notice, send a copy

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[1]Chapter 26, § 8-320.



thereof by mail, addressed to such defendant, if the place of residence is stated in such affidavit; and the certificate of the clerk that he has sent such notice in pursuance of this section, shall be evidence of that fact.

23. Default.] § 23. No default or proceeding shall be taken against any defendant not served with summons within the State and not appearing, unless the first publication or personal service outside of the State be at least thirty days prior to the day at which such default or proceeding is proposed to be taken.

24. Continuance for want of publication or service.] § 24. If for want of due publication or service the cause shall be continued, the same proceedings shall be had at a subsequent return day to be fixed by the court, as might have been had at the return day at which the writ is returnable.

25. Filing of complaint — Answer or appearance — Time.] § 25. The complaint shall be filed ten days before the return day of the attachment, and if so filed the defendant, subject to the provisions of Section 10 of this Act, shall file his answer or otherwise make his appearance on or before said day. If the complaint is not so filed the defendant shall not be compelled to appear or answer until fifteen days after the return day designated in the writ and if the complaint is not filed five days after the return day designated in the writ the defendant may, in the discretion of the court have the suit dismissed.

26. Civil Practice Act — Application.] § 26. The provisions of the Civil Practice Act, including the provisions for appeal, and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act.

27. Pleadings.] § 27. The defendant may answer, traversing the facts stated in the affidavit upon which the attachment issued, which answer shall be verified by affidavit; and if, upon the trial thereon, the issue shall be found for the plaintiff, the defendant may answer the complaint or file a motion directed thereto as in other cases, but if found for the defendant, the attachment shall be quashed, and the costs of the attachment shall be adjudged against the plaintiff, but the suit shall proceed to final judgment as though commenced by summons.

28. Amendments.] § 28. No writ of attachment shall be quashed, nor the property taken thereon restored, nor any garnishee discharged, nor any bond by him given canceled, nor any rule entered against the sheriff discharged, on account of any insufficiency of the original affidavit, writ of attachment or attachment bond, if the plaintiff, or some credible person for him, shall cause a legal and sufficient affidavit or attachment bond to be filed, or the writ to be amended, in such time and manner as the court shall direct; and in that event the cause shall proceed as if such proceedings had originally been sufficient.

29. Interpleading.] § 29. In all cases of attachment, any person, other than the defendant, claiming the property attached, or garnisheed may intervene, verifying his petition by affidavit, without giving bond, but such property shall not thereby be replevied; and the court shall immediately (unless good cause be shown by either party for a continuance) direct a jury to be impaneled to inquire into the right of the property. In all cases where the jury finds for the claimant, and that such claimant is also entitled to the possession of all or any part of such property, the court shall enter judgment for such claimant accordingly and order the property attached or garnisheed to which such claimant is entitled to be delivered to such claimant, and the payment of his costs in such action. In cases where the jury finds for a claimant but further find that such claimant is not then entitled to the possession of any such property such claimant shall be entitled to his costs; and where the jury find for the plaintiff in the attachment, such plaintiff shall recover his cost against such claimant. If such claimant is a non-resident of the State he shall file security for costs as in case of non-resident plaintiff.



30. Counterclaim.] § 30. Any defendant against whom an attachment may be sued out under this Act, may avail himself in his defense of any counter-claim properly pleadable by the laws of this State.

31. § 31. Repealed.

31a. Change of parties—Other amendments.] § 31a. The provisions in regard to joinder, nonjoinder or misjoinder of parties applicable to other civil cases, shall be applicable to attachment proceedings; and when any action has been commenced in the name of the wrong party as plaintiff, the court, if satisfied that it has been so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, may allow any other party or parties to be substituted.

No change of parties made, or any other amendment made by order of court, shall impair any previous attachment of the estate, or arrest of the body, of any defendant remaining in the action, nor impair any recognizance, bond or bail given by any party remaining either as against the defendant, defendants, his, its, or their sureties. No sureties shall be released by reason of any amendment made by order of court.

32. § 32. Repealed.

33. Proceedings in aid.] § 33. Upon the return of attachments issued in aid of actions pending, unless it shall appear that the defendant or defendants have been served with process in the original cause, notice of the pendency of the suit, and of the issue and levy of the attachment, shall be given as is required in cases of original attachment; and such notification shall be sufficient to entitle the plaintiff to judgment, and the right to proceed thereon against the property and estate attached, and against garnishees, in the same manner and with like effects as if the suit had been commenced by attachment.

34. Effect of judgment.] § 34. When the defendant has been served with the writ, or appears to the action, the judgment shall have the same force and effect as in suits commenced by summons; and execution may issue thereon, not only against the property attached, but the other property of the defendant.

35. Judgment by default — Special execution.] § 35. When the defendant shall be notified as aforesaid, but not served with process within the State, and shall not appear and answer the action, judgment by default may be entered, which may be proceeded upon to final judgment as in other cases of default, but in no case shall judgment be rendered against the defendant for a greater sum than appears, by the affidavit of the plaintiff, to have been due at the time of obtaining the attachment, with interest, damages and costs; and such judgment shall bind, and a special execution shall issue against the property, credits and effects attached, and no execution shall issue against any other property of the defendant; nor shall such judgment be any evidence of debt against the defendant in any subsequent suit.



36. Property levied upon.] § 36. The property attached may be levied upon by execution issued in the attachment suit, whether in the hands of the officer or secured by bond as provided in this act, and shall be sold as other property levied upon by execution.

37. Division of proceeds—Priority.] § 37. All judgments in attachments against the same defendant, returnable on the same day, and all judgments in suits by summons, capias or attachment against such defendant, recovered within thirty days from the day when the judgment in the first attachment upon which judgment shall be recovered is rendered, shall share pro rata, according to the amount of the several judgments, in the proceeds of the property attached, either in the hands of a garnishee or otherwise: Provided, when the property is attached while the defendant is removing the same or after the same has been removed from the county, and the same is overtaken and returned, or while the same is secreted by the defendant, or put out of his hands for the purpose of defrauding his creditors, the court may allow the creditor or creditors through whose diligence the same shall have been secured a priority over other attachments or judgment creditors.

38. Statement of participating judgments—Officer to divide proceeds.] § 38. Upon issuing execution against any property attached, the proceeds of which shall be required to be divided, the clerk shall, at the same time, make out and deliver to the sheriff or other officer to whom the execution is issued, a statement of all judgments, with the costs thereon, which shall be entitled to share in such proceeds, and when any judgment creditor shall have been allowed a priority over the other judgment creditors, the same shall be stated. Upon the receipt of such proceeds by the sheriff or other officer, he shall divide and pay over

the same to the several judgment creditors entitled to share in the same in the proportion they shall be entitled thereto.

39. Payment into court.] § 39. The court may, at any time before the proceeds of any attached property has been paid over to the judgment creditors, order the whole or any part thereof to be paid into court, and may make any and all such orders concerning the same as it shall deem just.

39a. Sale of live stock levied upon.] § 39a. When any live stock is levied upon in any attachment proceeding, the plaintiff may apply to any judge of the court in which the suit is pending for an order of sale thereof, and if it shall appear that the stock is fit for market, or that if not sold will depreciate in value, then the judge shall order a sale of the property on such terms as shall seem proper, and the proceeds shall be deposited with the clerk of the court in which the suit is pending until determined, and then be paid to the successful party in said suit.

40. Appeals.] § 40. The plaintiff or defendant in any attachment, person intervening, and the sheriff, or either of them, who may feel aggrieved by the final order or judgment of the court, may prosecute appeals as by law is provided in other civil cases.

41. Fraud.] § 41. This act shall be construed in all courts in the most liberal manner for the detection of fraud.

42. Repeal.] § 42. Chapter nine of the Revised Statutes of 1845, entitled "Attachments in Circuit Courts" (except so much thereof as pertains to proceedings against garnishees, not herein re-enacted), and also the several acts amendatory of said chapter, approved respectively February 17, 1851, and February 22, 1861, February 13, 1865, and March 31, 1869, and all acts and parts of acts inconsistent or in conflict with this act, are hereby repealed. This section shall not be construed to affect any suits pending or rights existing under said acts at the time this act shall take effect.



43. Repealed.

44. Amendments of pleadings. § 44. Where relief is sought under this Act and the Court determines, on motion directed to the pleadings, or on motion for summary judgment or upon trial, that the plaintiff has pleaded or established facts which entitle him to relief but that he has sought the wrong remedy, the Court shall permit the pleadings to be amended, on just and reasonable terms, and the Court shall grant the relief to which plaintiff is entitled on the amended pleadings or upon the evidence. In considering whether a proposed amendment is just and reasonable, the Court shall consider the right of the defendant to assert additional defenses, to demand a trial by jury, to plead a counter-claim or third party complaint, and to order the plaintiff to take additional steps which were not required under the pleadings as previously filed.

## EXHIBIT C TO DEFENDANTS' MEMORANDUM OPPOSING MOTION FOR A TEMPORARY RESTRAINING ORDER

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

[Caption omitted in printing]

### AFFIDAVIT

I, FESTEEN ANDERSON, being duly sworn, and on oath do state that:

1. I am an employee of E. J. Brach and Sons, Inc., 4656 West Kinzie Street, Chicago, Illinois, and hold the position of Manager of the Insurance Department.

2. In said position, I am responsible for the records of insurance coverage of employees of the Corporation.

3. JUAN HERNANDEZ is presently employed by E. J. Brach and Sons, Inc., and is insured by Metropolitan Life Insurance Company as provided in the attached Insurance Handbook, [omitted in printing] which includes in part:

(a) Hospitalization benefits
(b) Surgical benefits
(c) Major Medical benefits
(d) Out-patient and Maternity benefits

4. All employees of the Corporation are also eligible for sick pay benefits, after 12 months of continuous service.

5. Furthermore affiant sayeth not.

Festeen Anderson

[Jurat omitted in printing]



## EXHIBIT D TO DEFENDANTS' MEMORANDUM OPPOSING MOTION FOR A TEMPORARY RESTRAINING ORDER

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

[Caption omitted in printing]

### AFFIDAVIT

I, KATHERINE M. DUFFY, being duly sworn, and on oath do state:

1. I am an employee of E. J. Brach & Sons, Inc., 4656 West Kinzie Street, Chicago, Illinois, and hold the position of Administrative Assistant to Paymaster.

2. In said position, I am responsible for maintaining the payroll records of the Corporation.

3. JUAN HERNANDEZ is presently employed by this Corporation. His gross wages through November 23, 1974 were $9,676.04 (Nine Thousand, Six Hundred and Seventy-Six Dollars and Four Cents).

4. MARIA HERNANDEZ was employed by the Corporation through November 1, 1974, at which time she was laid off. Her gross earnings for the year were $6,043.77 (Six Thousand, Forty-Three Dollars and Seventy-Seven Cents).

5. Furthermore affiant sayeth not.

/s/ Katherine M. Duffy

[Jurat omitted in printing]

## EXHIBIT E TO DEFENDANTS' MEMORANDUM OPPOSING MOTION FOR A TEMPORARY RESTRAINING ORDER

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

[Caption omitted in printing]

**AFFIDAVIT**

I, JOHN SCHMIDT, being duly sworn, and on oath do state that:

1. I am an employee of E. J. Brach & Sons, Inc., 4656 Kinzie Street, Chicago, Illinois and hold the position of Manager of the Brach Credit Union.

2. In said position, I am responsible for records of payroll deductions and deposits, and withdrawals of funds in the Brach Credit Union by employees of the Corporation.

3. JUAN HERNANDEZ has been and presently is an employee of E. J. Brach & Sons, Inc., and has Account No. 58305636 with the Credit Union. Said account has been open since January 3, 1972, and had a balance of $1,193.31 (One Thousand, One Hundred and Ninety-three Dollars and Thirty-one Cents) on November 30, 1974. See attached summary sheet of deposits, withdrawals and balances [omitted in printing].

4. MARIA HERNANDEZ has been an employee of E. J. Brach & Sons, Inc., and has Account No. 73787439 with the Credit Union. Said account has been open since August 21, 1972 and had a balance of $472.78 (Four Hundred and Seventy-two Dollars and Seventy-eight Cents) on November 30, 1974. See attached summary sheet of deposits, withdrawals and balances.

5. Furthermore affiant sayeth not.

/s/ John Schmidt

[Jurat omitted inprinting]



## EXHIBIT F TO DEFENDANTS' MEMORANDUM OPPOSING MOTION FOR A TEMPORARY RESTRAINING ORDER

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

[Caption omitted in printing]

**AFFIDAVIT**

I, LIONEL BRAZEN, being duly sworn, and on oath do state that:

1. I am the Supervisor of the Excess Assistance service of the Illinois Department of Public Aid, and in said position am very familiar with the documents in the ordinary course of business which relate to public aid recipients who have received excess assistance; I have been employed in said position for over two and a half years.

2. JUAN HERNANDEZ applied for Aid to Families with Dependent Children—Unemployed (AFDC-U) assistance on March 24, 1972.

3. JUAN HERNANDEZ received said public assistance from April 17, 1972, through February 13, 1973.

4. JUAN HERNANDEZ received a total of $4,123.76 (FOUR THOUSAND, ONE HUNDRED TWENTY THREE DOLLARS AND SEVENTY SIX CENTS) in said public assistance from April 17, 1972 to February 13, 1973, as manifested by Forms DPA 52 and DPA 659 dated December 12, 1974 attached hereto as group Exhibit A [omitted in printing].

5. JUAN HERNANDEZ, as manifested by Exhibit B, attached [omitted in printing], a true and accurate copy of his Application for Assistance, a form kept in the normal

course of business, stated in his application for said assistance the following:

(a) that he was not employed
(b) that he had no current income
(c) that he had no personal property
(d) that he owned no real estate
(e) that he had no insurance

6. Furthermore affiant sayeth not.

/s/ Lionel Brazen

[Jurat omitted inprinting]



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

Filed March 3, 1975

[Caption omitted in printing]

## DEFENDANTS' MOTION TO DISMISS

NOW COME Defendants, JAMES L. TRAINOR, acting Director of the Illinois Department of Public Aid, and VIVIAN O'MALLEY, Chief of the Bureau of Resources and Legal Services, Illinois Department of Public Aid, by and through their attorney, WILLIAM J. SCOTT, Attorney General, State of Illinois, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, and moves this Court for an order dismissing the complaint and in support state as follows:

1. Insofar as the complaint seeks an award of damages against state public officials, it is a prohibited suit against the State of Illinois and barred by the 11th Amendment to the Constitution of the United States.

2. The complaint fails to state a claim for injunctive relief and/or declaratory relief.

a. The complaint fails to demonstrate any irreparable injury to Plaintiffs HERNANDEZ.

b. Plaintiffs have an adequate legal remedy under the laws of the State of Illinois, particularly, the laws and procedures available under the Civil Practice Act, Chapter 110, Ill. Rev. Stats., and the Attachment Act, Chapter 11, Ill. Rev. Stats.

c. As between a state agency charged with the responsibility to deter and rectify frauds against the State of Illinois, and, a former recipient of public aid charged with

defrauding the State of Illinois, the equities favor the state agency and not the person accused of fraud.

3. Illinois' Attachment statute meets the requirements of the Due Process Clause of the 14th Amendment of the United States Constitution as applied to this case involving a state agency.

a. All prejudgment deprivations of property are not violative of Due Process.

b. Prejudgment attachment without prior notice of the property of a person alleged to have violated both the Civil and Criminal Statutes of the State of Illinois is an extraordinary situation justifying the postponement of notice and an opportunity for á prior hearing.

c. The Illinois Attachment Act in conjunction with the Civil Practice Act provides an attachment debtor with a meaningful opportunity for an immediate post-seizure hearing.

d. Prejudgment attachment without an opportunity for a prior hearing by a judicial officer is justified under the Due Process Clause where the claim is based upon Quasi-Contract or restitution and where there is strong documentary evidence of fraudulent conduct.

WHEREFORE, Defendants respectfully request that this Court grant their motion to dismiss the complaint with prejudice and without costs and to enter judgment in their favor.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General
State of Illinois

[Names and addresses of counsel omitted in printing]



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

Filed March 6, 1975

[Caption omitted in printing]

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs move this Honorable Court to grant summary judgment in their favor in this cause, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the grounds that there is no genuine issue as to any material fact and the plaintiffs are entitled to judgment in their favor as a matter of law.

/s/ Fred L. Lieb

[Names and addresses of counsel omitted in printing]

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

Filed March 6, 1975

[Caption omitted in printing]

## AFFIDAVIT

I, JOHN CHAVEZ, being duly sworn on oath depose and state that:

1. I am employed as a full time legal para-professional by the Legal Assistance Foundation of Chicago, and, as such, have had numerous occasions to check court files to obtain information for the attorneys in our office.

2. I am enrolled as a student in the evening division at the DePaul University, College of Law.

3. Pursuant to a request by Fred Lieb and Alan Dockterman, attorneys for the plaintiffs in this case, I obtained the following information from the office of the Clerk of the Circuit Court of Cook County:

a. During 1974, there were ninety-six attachment cases filed in the Circuit Court of Cook County, Municipal Department, First District. I was able to locate the files for seventy-eight of these cases.

b. In forty of the seventy-eight cases the plaintiffs alleged fraudulent conduct on the part of the defendant as grounds for the attachment.

c. In seventeen of the seventy-eight cases the defendant filed an appearance; in thirteen of those cases the appearance was filed on the return date.



d. The average period of time elapsed in all seventy-eight cases from the date the writ of attachment was served until the return date of the writ was 18.2 days. The longest period of time was fifty-nine days.

e. In none of the cases was a hearing ever held on or before the return date.

f. In those thirteen cases where the defendant filed an appearance on the return date, the average period of time elapsed from the date the writ was served until the first scheduled trial date was thirty-nine days. The longest period of time was seventy days.

/s/ John Chavez

[Jurat omitted in printing]

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

[Caption and portion of order

setting briefing schedule omitted]

**ORDER ALLOWING DEFENDANTS FINLEY AND ELROD TO ADOPT MOTION TO DISMISS**

[O]rdered that State's Attorney is permitted to adopt motion to dismiss filed by Atty. Gen. and further that Morgan Finley is substituted in place of Matthew Danaher.

/s/ Kirkland, J. Mar. 7, 1975



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

[Caption omitted in printing]

**DESIGNATION OF THREE-JUDGE COURT**

The undersigned Chief Judge of the Seventh Circuit having been notified by the Honorable Alfred Y. Kirkland, United States District Judge for the Northern District of Illinois, of the filing of the above-mentioned cause, does hereby pursuant to Title 28 U.S.C. §2284 designate the

HONORABLE WILBUR F. PELL, JR.

a United States Circuit Judge for the Seventh Judicial Circuit and the

HONORABLE JOEL M. FLAUM

a United States District Judge for the Northern District of Illinois, to serve with the

HONORABLE ALFRED Y. KIRKLAND

as members of a three-judge United States District Court to hear and determine the above-entitled action or proceeding.

Dated this twenty-first day of March, 1975

/s/ Thomas E. Fairchild
Chief Judge of the Seventh Circuit

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

[Caption omitted in printing]

**ORDER FOR ADDITIONAL**
**BRIEFS ON COURT'S OWN MOTION**

The parties are directed to brief the issue of whether *Huffman* v. *Pursue, Ltd.*, —— U.S. ——, 95 S. Ct. 1200 (March 18, 1975) requires the above captioned cause to be dismissed. Defendants shall have until July 29, 1975 to file the initial brief. Plaintiffs shall have until August 18, 1975 to respond. Defendants shall have until August 29, 1975 to reply. Page limitations in accordance with the local rules.

/s/ Kirkland, J. July 9, 1975



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

[Caption omitted in printing]

**ORDER**

This Court pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure has fully considered the plaintiffs' motion to certify this suit as a plaintiff and defendant class action, the memoranda in support thereof, defendants' response thereto, and the other documents filed in this matter, and finds as follows:

1. Plaintiffs are persons whose property was attached upon a creditor's allegation of fraudulent conduct pursuant to the Illinois Attachment Act, Ill. Rev. Stat. ch. 11, §1, parts sixth through ninth.

2. Plaintiffs represent the class of all persons who now have or may have their property attached upon a creditor's allegation of fraudulent conduct pursuant to the Illinois Attachment Act, Ill. Rev. Stat. ch. 11, §1, parts sixth through ninth.

3. The plaintiff class meets all the requirements of Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

4. Defendant Morgan M. Finley is the Clerk of the Circuit Court of Cook County.

5. Defendant Finley represents the class of all persons who are clerks of the circuit courts for the judicial circuits of Illinois.

6. Defendant Richard J. Elrod is the elected sheriff of Cook County.

7. Defendant Elrod represents the class of all persons who are county sheriffs of Illinois.

8. The defendant classes meet all the requirements of Rules 23(a) and 23(b)(1)(A) of the Federal Rules of Civil Procedure.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this suit may be maintained as a plaintiff and defendant class action.

The plaintiff class is defined as all persons who now have or may have their property attached upon a creditor's allegation of fraudulent conduct pursuant to the Illinois Attachment Act, Ill. Rev. Stat. ch. 11, §1 parts sixth through ninth.

The defendant classes are defined as follows: all clerks of the circuit courts for the judicial circuits of Illinois; all county sheriffs of Illinois.

Enter:

/s/ ALFRED Y. KIRKLAND,
ALFRED Y. KIRKLAND
U. S. District Court Judge

Date: October 31, 1975



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

*Plaintiffs,*

v.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Acting Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

*Defendants.*

No. 74 C 3473

**ORDER**

In accordance with this Court's memorandum opinion, the Court enters judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure as follows:

1. Illinois Revised Statutes, Chapter 11, Sections 1, 2, 2a, 6, 8, 10 and 14 are on their face patently violative of

the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Defendants Finley and Elrod are ordered to cause release of all property of plaintiffs Juan and Maria Hernandez attached pursuant to writ of attachment.

3. Defendant Finley and all other clerks for the judicial circuits of Illinois, their successors, agents and employees are hereby enjoined from issuing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11 §1, subsections sixth through ninth.

4. Defendant Elrod and all other county sheriffs of the State of Illinois, their successors, agents and employees are hereby enjoined from executing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11 §1, subsections sixth through ninth.

5. Defendants Trainor and O'Malley are hereby enjoined from authorizing and processing applications for writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, §1, subsections sixth through ninth.

6. Defendants Finley and Elrod, all other clerks of the judicial circuits of Illinois, and all other county sheriffs of Illinois, are ordered to cause release of any property currently attached pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, §1, subsections sixth through ninth, and give notice of such release to all persons whose property is the object of such attachments.



7. The question of plaintiffs' entitlement to money damages is remanded for determination to Judge Kirkland, the Judge to whom this case was originally assigned.

ENTER:

/s/ WILBUR F. PELL, JR.,
WILBUR F. PELL, JR.,
U.S. Circuit Court Judge

/s/ JOEL M. FLAUM,
JOEL M. FLAUM
U.S. District Court Judge

/s/ ALFRED Y. KIRKLAND,
ALFRED Y. KIRKLAND
U.S. District Court Judge

DATED: Dec. 15, 1975

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

*Plaintiffs,*

v.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Acting Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

*Defendants.*

No. 74 C 3473

Before PELL, Circuit Judge, FLAUM and KIRKLAND, District Judges.

KIRKLAND, District Judge. This matter comes before the Court on motion of defendants to dismiss the complaint for failure to state a claim upon which relief could be granted. Plaintiffs have cross-filed for summary judgment on entitlement to declaratory and injunctive relief. Further,



on instruction by the Court, the parties briefed the issue of whether, in light of *Huffman* v. *Pursue Ltd.*, —— U.S. ——, 95 S. Ct. 1200 (1975), this Court should enjoin a pending state attachment proceeding against plaintiffs prior to exhaustion of state judicial remedies.

The Illinois Department of Public Aid ("IDPA") filed suit in Circuit Court of Cook County, Illinois, on October 30, 1974, alleging that plaintiffs had fraudulently concealed the existence of monies while applying for and receiving public aid assistance. Simultaneous with filing of this suit, IDPA filed an attachment complaint which resulted in attachment of plaintiffs' funds in a credit union on November 5, 1974. After answering the complaint and filing their appearance, plaintiffs filed the instant complaint in federal court challenging the constitutionality of the Illinois Attachment Act and seeking declaratory, injunctive and other relief.

Jurisdiction is alleged under 28 U.S.C. §1343 (3) and (4) and 42 U.S.C. §1983. The complaint challenges the constitutionality of the Illinois Attachment Act, Ch. 11 §§1, 2, 2a, 6, 8, 10, and 14. The Act is alleged to be unconstitutional both on its face and as applied on grounds that it violates the due process clause of the Fourteenth Amendment to the United States Constitution.

Two issues are presented to this Court for decision: (1) does *Huffman* v. *Pursue Ltd., supra,* prevent this Court from intervening in a state civil proceeding filed pursuant to a state statute alleged to be unconstitutional; and (2) if the preceding question is answered in the negative, are the challenged portions of the Illinois Attachment Act unconstitutional?

I. MUST FEDERAL ACTION BE RESTRAINED PENDING EXHAUSTION OF STATE REMEDIES?

The Supreme Court in *Huffman* extended for the first time the doctrine of non-interference with state criminal proceedings, articulated in *Younger* v. *Harris,* 401 U.S. 37 (1971), to a civil proceeding. The remedy presently sought by plaintiffs would require this Court to enjoin a state court civil proceeding; hence we are constrained at the outset to examine the applicability of *Huffman* prior to any consideration of the merits of this case.

The only obstacle to reaching the merits of this case would be a determination that the principles articulated in *Huffman* apply here.

It is clear that this Court is empowered to enjoin state action under certain circumstances, notwithstanding the general prohibition against such injunctions found in 28 U.S.C. §2283. *Mitchum* v. *Foster,* 407 U.S. 225 (1972), held that the anti-injunction rule of Section 2283 does not apply to civil rights actions under 42 U.S.C. §1983. Likewise, if the Illinois attachment proceeding were determined not to be "proceedings in a state court", the anti-injunction statute by its own terms would not apply. This Court holds the challenged attachment proceeding to be a pending proceeding within the meaning of Section 2283.

The *Huffman* case arose out of an attempt by the State of Ohio to close a theatre which showed allegedly obscene films, on grounds that the theatre was creating a public nuisance. The state proceeded under the Ohio nuisance statute, which defined a place exhibiting obscene films as a nuisance. The Ohio Court determined in an adversary proceeding that the films were obscene and immediately ordered that the theatre be closed. Following this decision, and without exhausting state appellate procedure, the theatre operator filed suit in federal court. A three-judge district court held that closing of the theatre by the Ohio



State Court was violative of the plaintiff operator's constitutional rights because the films had not been declared obscene prior to their exhibition. The plaintiff operator had not exhibited any films after the determination that said films were obscene.

The Supreme Court vacated the order of the three-judge court on grounds of equity, comity, and federalism, holding that the principles of *Younger* v. *Harris, supra.,* were applicable even though the state proceeding was civil in nature.

The *Younger* decisi gave approval to long-standing policy that federal courts should not interfere with state criminal proceedings except in extraordinary circumstances. See *Fenner* v. *Boykin,* 271 U.S. 240 (1926); *Spielman Motor Sales Co.* v. *Dodge,* 295 U.S. 89 (1935); *Stefanelli* v. *Minard,* 342 U.S. 117 (1951). *Younger* specifically held that federal injunctive relief should not be employed against state criminal prosecutions except: (1) upon a showing of "irreparable injury" that is both "great and immediate"; or (2) where the statute in question is "flagrantly and patently violative of express constitutional prohibitions". 401 U.S. at 53.

The decision in *Huffman* is significant in that it represents the first extension of these principles to non-criminal proceedings. In extending this doctrine, the Court stated that action of the State of Ohio was more akin to criminal proceedings than most civil cases. 95 S.Ct. 1208. This Court is of the opinion, however, that *Huffman* v. *Pursue Ltd.* is not applicable here for two reasons.

First, the rule of *Younger* was established for, and has been limited in application to, criminal proceedings. The Court's principal justification for extension of the *Younger* doctrine in *Huffman* was that Ohio's civil proceeding was

"in aid of and closely related to criminal statutes". 95 S. Ct. 1208. In *Huffman,* the State of Ohio proceeded under a statute which gave an exclusive right of action to the state. By contrast, the Illinois Attachment Act provides a cause of action for any person, public or private. It is mere happenstance that the State of Illinois was the petitioner in this attachment proceeding. It is likewise coincidental that the pending state proceedings may arguably be quasi-criminal in nature; under the Illinois Attachment Act, they need not be. These major distinctions preclude this Court from extending the principles of *Younger,* based on considerations of equity, comity and federalism, beyond the quasi-criminal situation set forth in *Huffman.*

Second, an express exception to the *Younger* rule of non-interference in state criminal proceedings exists where the challenged statute is patently and flagrantly violative of the constitution. This Court is of the opinion that the present case falls within that exception, for reasons hereinafter set forth.

## II. IS THE ILLINOIS ATTACHMENT ACT UNCONSTITUTIONAL?

Four recent Supreme Court cases are controlling authority in an analysis of constitutional validity of summary creditor remedies. These cases include *Sniadach* v. *Family Finance Corp.,* 397 U.S. 254 (1969), *Fuentes* v. *Shevin,* 407 U.S. 67 (1972); *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600 (1974); and *North Georgia Finishing Inc.* v. *Di-Chem Inc.,* —— U.S. ——, 42 L. Ed. 2d 753 (1975).

In *Sniadach* v. *Family Finance Corp., supra,* the Court held that a Wisconsin pre-judgment garnishment procedure which resulted in garnishment of wages without notice and prior hearing, violated fundamental principles of due process.



In *Fuentes* v. *Shevin, supra,* the Supreme Court examined the replevin acts of Florida and Pennsylvania. Both acts authorized the issuance of pre-judgment writs of replevin through a summary process of *ex parte* application to the court clerk, accompanied by the posting of bond for an amount in excess of the property's value. Neither act provided for notice and prior hearing or an immediate post-seizure hearing. Both acts did permit the respondent to recover his replevied property upon posting of a bond in double the amount of its value. The Court held that procedural due process required that a person in possession of chattels be given an opportunity for a hearing prior to issuance of a writ of replevin. The Court further held that posting of a bond was a minimal deterrent to abusive or even good faith use of the replevin procedure and constituted no substitute for a pre-seizure hearing.

In *Mitchell* v. *W. T. Grant Co., supra,* the Supreme Court carved out an exception to the pre-seizure hearing rule promulgated in *Sniadach* and *Fuentes.* There the Court upheld the validity of a Louisiana sequestration act which authorized sequestration of encumbered property upon *ex parte* application of a creditor without notice to the debtor or opportunity for prior hearing. The Court found, however, that the Louisiana act did provide safeguards not present in those statutes analyzed in *Sniadach* and *Fuentes.*

First, the Louisiana act required the creditor to file an affidavit before a judge, setting forth factual rather than conclusory allegations which entitled the creditor to relief. A writ would only issue by the judge upon the proper showing. Second, and of equal importance, the act expressly entitled the debtor to an immediate post-seizure hearing; a hearing in which the burden was upon the creditor to prove the allegations contained in the affidavit.

The Court found that these provisions sufficiently safeguarded the rights of the debtor to eliminate necessity for prior notice and hearing.

A Georgia garnishment act was examined by the Court in *North Georgia Finishing Inc.* v. *Di-Chem, supra.* The Court determined that Georgia's summary procedure for garnishment satisfied neither the *Sniadach* and *Fuentes* requirement of pre-seizure hearing, nor the alternative judicial safeguards approved in *Mitchell.*

Having briefly summarized the applicable law, the Court now turns to the Illinois statute under constitutional challenge.

The Illinois Attachment Act (Illinois Revised Statutes, Ch. 11, 1973) authorizes a creditor with a money claim, whether liquidated or unliquidated and whether sounding in contract or tort, to attach the assets of an alleged debtor pending outcome of a lawsuit against the debtor on the money claim. The creditor can obtain a writ of attachment prior to filing his complaint against the debtor[1] and prior to the debtor having received notice of impending attachment or an opportunity to be heard on the question of whether the writ should issue.

Section 1 of the Act provides for attachment in any of nine circumstances. Plaintiffs specifically attack four subsections which authorize attachment upon the creditor's allegations of debtor fraud:

> SIXTH: Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently

---

1. Pursuant to §25 of the Act, the complaint must be filed at least ten days before the return date of the writ of attachment.



> conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.
>
> SEVENTH: Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.[2]
>
> EIGHTH: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.
> NINTH: Where the debt sued for was fraudulently contracted on the part of the debtor. . . . Ill. Rev. Stat., Ch. 11 §1, sixth through ninth.

A creditor will be entitled to a writ of attachment, against an alleged debtor's property, upon the filing of an affidavit by the creditor, or his agent or attorney, which sets forth in verbatim statutory language one of the above allegations, along with the nature and amount of the claim and the name and place of residence of the debtor. Upon filing of this affidavit and the required bond with the clerk of the circuit court, the clerk issues a writ of attachment directing the sheriff to serve it upon the debtor, or another person holding the debtor's property.

If the action sounds in tort, under Section 2 of the Act the creditor must apply to a judge of the circuit court. The judge, after questioning the creditor concerning the cause of action, endorses upon the affidavit the amount of damages for which the writ shall issue. Upon service of the writ, the sheriff takes and retains custody of the property attached or directs a third party in possession to withhold the attached property from the debtor.

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2. This is the sole allegation of fraud set forth in the affidavit of Defendant O'Malley upon which the writ of attachment was issued.

The debtor may obtain release of his property prior to trial on the merits of the creditor's claim in two ways. First, the debtor can file a bond in double the value of the property attached, upon the condition that said property will be available for execution should judgment be rendered against him. Alternatively, he can file a bond in a sum sufficient to cover the amount of debt or damages alleged plus costs of suit.

Second, Section 27 of the Act provides that defendant debtor may answer by affidavit, denying the allegations set forth in the creditor's attachment affidavit; and if the court finds for defendant after trial on the merits of the attachment, the writ will be quashed. This section, however, does not give defendant an absolute right to a hearing on the attachment issue immediately after seizure.

The debtor whose property has been attached is thereby deprived of the use of his property from the date the writ is served until an uncertain future time when he receives a hearing on the attachment issue. Even if the debtor should seek a separate hearing thereon on the return date, the debtor can be deprived of his property for a period of sixty days, since Section 6 of the Act provides that the creditor shall set the return date from ten to sixty days after date of the writ.

It is clear on its face that the Illinois Attachment Act does not meet the due process standards established by the Supreme Court in the cases previously discussed.

The Illinois Act does not provide for pre-seizure hearing as required by *Fuentes*. Because of *Mitchell* v. *W. T. Grant Co., supra,* however, this Court does not hold that pre-seizure hearing is any longer an absolute requirement. However, neither does the Act provide the alternative safeguards approved by *Mitchell*. Specifically, the Illinois Act



does not require the attachment creditor to set out facts in his affidavit which would entitle him to relief. The Act does not require the complainant to present such affidavit to a judge for determination of whether a writ should issue. Instead, the Act provides that upon conclusory allegations in verbatim statutory language, coupled with certain procedural information, a writ will automatically issue from the clerk of the court.

The provision for judicial review in tort cases is limited only to the question of potential damages and determination of limit on the amount of property to be attached. The judge is not required to evaluate the legal sufficiency of sworn facts as was the case in *Mitchell*.

Neither does the Act provide for an *immediate* post-seizure hearing upon application of the debtor, a hearing in which the attachment creditor bears the burden of proving his entitlement to relief at risk of dissolution of the writ. The Illinois Act merely provides for a post-seizure hearing on application by the debtor at a time to be set at the convenience of the Court. The Court, therefore, is under no duty to set an immediate hearing.

For these reasons, this Court holds that the Illinois Attachment Act is on its face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

Plaintiffs are entitled to injunctive relief against defendants. Separate order to issue in accordance with this opinion.

December 15, 1975.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

[Caption and portion of order setting briefing schedule omitted]

**ORDER ALLOWING DEFENDANTS FINLEY AND ELROD TO ADOPT PLEADINGS**

Motion of defendants Finley and Elrod to adopt pleadings and memoranda filed and to be filed by the state defendants is granted.
/s/ Kirkland, J.

January 30, 1976



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

Filed February 3, 1976

JUAN HERNANDEZ, et al.,
Plaintiff-Appellees,
vs.
MORGAN M. FINLEY, et al.,
Defendants-Appellants.
Civil Action No. 74 C 3473

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that James Trainor and Vivian O'Malley, defendants herein, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on the 15th day of December, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1253.

WILLIAM J. SCOTT
Attorney General
State of Illinois
By: /s/ PAUL J. BARGIEL,
PAUL J. BARGIEL
Assistant Attorney General
160 North LaSalle Street,
Suite 800
Chicago, Illinois 60601
(793-5635)

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

Filed February 10, 1976

JUAN HERNANDEZ, et al.,
Plaintiffs,
vs.
MORGAN M. FINLEY, et al.,
Defendants.
No. 74 C 3473

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

PLEASE TAKE NOTICE that defendants Morgan M. Finley and Richard J. Elrod hereby appeal to the United States Supreme Court from the final judgment entered on December 15, 1975 in this cause.

This appeal is taken pursuant to 28 U.S.C. 1253.

BERNARD CAREY
State's Attorney of Cook County

By: /s/ JOHN A. DIENNER, III
JOHN A. DIENNER, III

Assistant State's Attorney
500 Chicago Civic Center
Chicago, Illinois 60602
443-7940



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

[Caption omitted in printing]

**ORDER**

This matter comes before the Court on motion of all defendants to stay the injunction entered by this Court on December 15, 1975, pending appeal to the United States Supreme Court.

In order to gain a stay of injunction pending appeal, the movant must demonstrate: (1) a strong likelihood that movant will prevail on the merits; (2) irreparable injury to the movant in the absence of a stay; (3) lack of substantial harm to other parties to the litigation; and (4) public interest will be served by entry of a stay. *Virginia Petroleum Jobbers Assn.* v. *Federal Power Commission*, 259 F. 2d 921 (D.C. Cir. 1958); *In Re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Belcher* v. *Birmingham Trust National Bank*, 395 F. 2d 685 (5th Cir. 1968).

Defendants have not persuaded this Court that the aforesaid requirements have been satisfied.

Accordingly, the motion for a stay is denied.

WILBUR F. PELL, JR.,
U.S. CIRCUIT COURT JUDGE

/s/ JOEL M. FLAUM,
JOEL M. FLAUM,
U.S. DISTRICT COURT JUDGE

/s/ ALFRED Y. KIRKLAND,
ALFRED Y. KIRKLAND,
U.S. DISTRICT COURT JUDGE

DATED: February 25, 1976

This order has not been signed by Judge Pell who would have granted a stay. 2/25/76 /s/ William F. Pell, Jr.

**SUPREME COURT OF THE UNITED STATES**

**No. 75-1407**

James Trainor. etc.. et al.,

*Appellants.*

v.

Juan Hernandez, et al. etc.

*Appellants.*

APPEAL from the United States District Court for the Northern District of Illinois. The Motion of the Appellees for leave to proceed *in forma pauperis* is granted. In this case probable jurisdiction is noted.

June 7, 1976



**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

Filed June 22, 1976

[Caption omitted in printing]

**MOTION TO DISMISS APPEAL OF DEFENDANTS FINLEY AND ELROD**

The plaintiffs, by their attorney, move this Court to dismiss the appeal of defendants Finley and Elrod to the United States Supreme Court from the judgment entered in this cause of December 15, 1975. In support thereof, plaintiffs state as follows:

1. On December 15, 1975, this Court granted the plaintiffs the declaratory and injunctive relief requested in their complaint.

2. On February 10, 1976, defendants Finley and Elrod filed a notice of appeal to the Supreme Court of the United States. However, said defendants have not docketed their appeal in the United States Supreme Court by filing a Jurisdictional Statement within 60 days of their notice of appeal as required by Supreme Court Rule 13(2). See *Shapiro* v. *Doe,* 396 U.S. 488 (1970).

3. Rule 14(2) of the United States Supreme Court provides in pertinent part

. . . if a notice of appeal has been filed but the case has not been docketed in this Court within the time for docketing, the court possessed of the record may dismiss the appeal upon motion of the appellee and notice to the appellant . . .

4. The record in this cause remains in the possession of the district court.

WHEREFORE, plaintiffs pray that this Court dismiss the appeal of defendants Finley and Elrod.

Respectfully submitted,

/s/ Fred L. Lieb,

Counsel for Plaintiffs

[Name and address of counsel omitted in printing]



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

[Caption omitted in printing.]

**ORDER**

In view of the questionable jurisdictional basis for this motion and in view of the fact that the issue raised by this motion may properly be presented to the Supreme Court, this Court declines to rule upon plaintiffs' motion to dismiss the County defendants' appeal.

ENTER:

/s/ WILBUR F. PELL, JR.,
WILBUR F. PELL, JR.,
U.S. Circuit Court Judge

/s/ JOEL M. FLAUM,
JOEL M. FLAUM
U.S. District Court Judge

/s/ ALFRED Y. KIRKLAND,
ALFRED Y. KIRKLAND
U.S. District Court Judge

DATED: June 30, 1976

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

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No. 75-1407

---

MORGAN M. FINLEY, et al.,
Appellants,

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, et al.,
Appellees.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Juan Hernandez and Maria Hernandez, Appellees, ask leave to proceed in forma pauperis and to file their Motion to Dismiss or Affirm and all subsequent papers in accordance with Supreme Court Rule 53. The affidavit of the Appellees in support of this motion is attached hereto.

Fred L. Lieb

Fred L. Lieb
Legal Assistance Foundation of Chicago
4564 N. Broadway
Chicago, IL 60640
(312) 769-1015

Counsel for Appellees

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-1407

MORGAN M. FINLEY, et al.,

Appellants,

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, et al.,

Appellees.

AFFIDAVIT IN SUPPORT OF APPELLEES' MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

We, JUAN HERNANDEZ and MARIA HERNANDEZ, being first duly sworn according to law, depose and say that we are the Appellees in the above-entitled cause, and in support of our application for leave to proceed in forma pauperis, state:

1. We are married and have four children ages 7, 8, 10 and 12.

2. Affiant, JUAN HERNANDEZ, is employed as a laborer and brings home approximately $150.00 per week. Affiant, MARIA HERNANDEZ, is presently unemployed and receives $95.00 per week as unemployment compensation. We have no other source of income.

3. Because of our present financial situation, we are unable to pay the cost of printing the papers which we must file in response to those filed by the appellants.

4. The district court below found the Illinois Attachment Act unconstitutional and ordered the defendants to return our property which had been attached. We believe the court was correct and desire the opportunity to file the appropriate papers in this Court to dismiss the appeal or affirm the judgment below.

Juan Hernandez
JUAN HERNANDEZ

Maria Hernandez
MARIA HERNANDEZ

Subscribed and sworn to before me

May 3, 1976

Notary public

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1407

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

Appellants,

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

Appellees.

Appeal from the United States District Court

For the Northern District of Illinois

MOTION TO DISMISS APPEAL OF APPELLANTS FINLEY AND ELROD FOR WANT OF JURISDICTION

Appellees, Juan Hernandez and Maria Hernandez, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal of Appellants Finley and Elrod be dismissed for want of jurisdiction. In support of said motion appellees state as follows:

1. Appellants Finley and Elrod filed their Notice of Appeal in the district court on February 10, 1976.

2. Appellants failed to file a Jurisdictional Statement within sixty days of Notice of Appeal as required by Rule 13(1) of the Rules of the Supreme Court of the United States. This

Court therefore does not have jurisdiction to consider any appeal of Appellants Finley and Elrod. Shapiro v. Doe, 396 U.S. 488 (1970); Pittsburgh Tow Co. v. Mississippi Barge Line, 385 U.S. 32 (1966).

WHEREFORE, Appellees respectfully request this Court to dismiss the appeal of Appellants Finley and Elrod for want of jurisdiction.

Respectfully submitted,

Fred L. Lieb

Fred L. Lieb
Alan Dockterman
James O. Latturner
Legal Assistance Foundation
of Chicago
4564 N. Broadway
Chicago, IL 60640
(312) 769-1015

Counsel for Appellees

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SUPREME COURT, U.S.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1407

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

Appellants,

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

Appellees.

Appeal from the United States District Court

for the Northern District of Illinois

# MOTION TO DISMISS APPEAL OF APPELLANTS TRAINOR AND O'MALLEY OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENT BELOW

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

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No. 75-1407

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MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

Appellants,

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

Appellees.

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Appeal from the United States District Court

for the Northern District of Illinois

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MOTION TO DISMISS APPEAL OF APPELLANTS TRAINOR AND O'MALLEY OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENT BELOW

Appellees, Juan Hernandez and Maria Hernandez, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal of Appellants Trainor and O'Malley be dismissed, or, in the alternative, that the judgment of the district court be affirmed on the grounds that the questions presented are so unsubstantial as not to warrant further consideration.

## STATEMENT OF THE CASE

Appellees adopt Appellants' statement of the case except for their assertion that temporary relief was denied by the district court. (Appellants' Jurisdictional Statement at 6.) The court below never ruled on plaintiffs' motion for a temporary restraining order, but instead persuaded the defendants to release one-half of the attached funds to the plaintiffs pending the outcome of the lawsuit.

## ARGUMENT

### I

### THE APPEAL OF APPELLANTS TRAINOR AND O'MALLEY PRESENTS NO CASE OR CONTROVERSY WHICH CAN BE RESOLVED BY THIS COURT AND SHOULD THEREFORE BE DISMISSED.

Notice of Appeal to the United States Supreme Court was filed in the district court by defendants Trainor and O'Malley on February 3, 1976 and by defendants Finley and Elrod on February 10, 1976. Finley and Elrod, however, failed to submit a jurisdictional statement within sixty days of their Notice of Appeal as required by Rule 13(1) of the Rules of the Supreme Court of the United States. Accordingly Appellees have filed with this court a motion to dismiss the appeal of Finley and Elrod for want of jurisdiction. See, Shapiro v. Doe, 396 U.S. 488 (1970); Pittsburgh Tow Co. v. Mississippi Barge Line, 385 U.S. 32 (1966). The only appeal before this court is therefore that of Trainor and O'Malley. Appellees contend that absent an appeal by Finley and Elrod, the appeal of Trainor and O'Malley presents no live case or controversy which can be resolved by this court.

The district court entered the following injunctions against the defendants:

...

2. Defendants Finley and Elrod are ordered to cause release of all property of plaintiffs Juan and Maria Hernandez attached pursuant to writ of attachment.

3. Defendant Finley and all other clerks for the

judicial circuits of Illinois, their successors, agents and employees are hereby enjoined from issuing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11 §1, subsections sixth through ninth.

4. Defendant Elrod and all other county sheriffs of the State of Illinois, their successors, agents and employees are hereby enjoined from executing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11 §1, subsections sixth through ninth.

5. Defendants Trainor and O'Malley are hereby enjoined from authorizing and processing applications for writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, §1, subsections sixth through ninth.

6. Defendants Finley and Elrod, all other clerks of the judicial circuits of Illinois, and all other county sheriffs of Illinois, are ordered to cause release of any property currently attached pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, §1, subsections sixth through ninth, and give notice of such release to all persons whose property is the object of such attachments.

...

(Order of December 15, 1975, Appendix A, Appellants' Jurisdictional Statement)

Defendants Trainor and O'Malley purport to appeal the entire order of December 15, 1975, including those portions of the order directed solely against defendants Finley and Elrod and the classes they represent. It is settled law, however, that a party may only appeal a judgment directed against him even though he is injured economically by the judgment. Stearns-Roger Mfg. Co. v. Brown, 114 F. 939 (8th Cir. 1902); Spriggs v. Stone, 174 F.2d 671 (D.C. Cir. 1949); Milgram v. Loew's Inc., 192 F.2d 579 (3rd Cir.) cert. denied, 343 U.S. 929 (1951); Seaboard Surety Co. v. United States, 306 F.2d 855 (9th Cir. 1962). Since Finley and Elrod have chosen not to perfect an appeal of the injunctions against them, those injunctions are not before this court and may not be raised on the appeal of Trainor and O'Malley. Swarb v. Lennox, 405 U.S. 191, 201 (1972); Strunk v. United States, 412 U.S. 434, 437 (1972). Therefore the injunctions against Finley and Elrod remain in full force and effect regardless of the outcome of the Trainor and O'Malley appeal.

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The only judgment entered by the district court against Trainor and O'Malley is an injunction enjoining them from authorizing and processing applications for writs of attachment pursuant to certain sections of the Act. Even if Trainor and O'Malley were to prevail on an appeal of this injunction, they could still not obtain pre-judgment attachments since all clerks and sheriffs of Illinois are enjoined from issuing and executing writs of attachment pursuant to those sections of the Act. Thus, there is no effective relief which the Court can give to Trainor and O'Malley. When the controlling issues in a case become moot and the remaining issues are insufficient in the context of the case to save it from mootness, the appellate court should refuse to take the case for review. 6A Moore's Federal Practice ¶57.13 at 57-124. See, Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972). Similarly, when, as here, the controlling issues in the case are no longer justiciable because they have not been timely appealed, and the remaining issue is insignificant in the context of the entire case since appellants cannot be given any effective relief, this Court should not exercise its jurisdiction. This appeal should therefore be dismissed for want of a case or controversy between the parties before the Court.[1/]

II

THIS APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

Appellants premise their jurisdiction on 28 U.S.C. §1253, which provides, in pertinent part, for "...appeal to the Supreme Court from an order granting...a permanent injunction in any civil suit or proceeding required by any Act of Congress to

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1/ Plaintiffs' claim for damages against defendants has not yet been adjudicated because of the pendency of the appeal. The issue of damages is therefore not yet ripe and cannot satisfy the case or controversy requirement.

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be heard and determined by a district court of three judges." (emphasis added). Therefore if the convening of a three-judge court was not required, then this court lacks jurisdiction. Pennsylvania Pub. Util. Comm'n v. Pennsylvania, 382 U.S. 281 (1965); Bailey v. Patterson, 369 U.S. 31 (1962).

A. The Injunction Entered By The District Court Against Appellants Trainor And O'Malley Did Not Require The Convening Of A Three-Judge Court And Therefore Is Not Directly Appealable To The Supreme Court Pursuant To 28 U.S.C. §1253.

28 U.S.C. §2281 requires the convening of a three-judge court only upon the request for an "...injunction restraining the enforcement, operation, or execution of any State statute by restraining the action of any officer of such State in the enforcement, or execution of such statute..." A three-judge court was convened here because plaintiffs requested an injunction enjoining the Clerk of the Circuit Court of Cook County (Finley) and the Sheriff of Cook County (Elrod) from enforcing and executing the Illinois Attachment Act. The three-judge court granted plaintiffs the injunctive relief requested against these officers. Order of December 15, 1975, Appendix A, Appellants' Jurisdictional Statement.

A three-judge court, however, was not required to hear plaintiffs' request for an injunction against defendants Trainor and O'Malley since these defendants are not state officers within the meaning of 28 U.S.C. §2281. See, Moody v. Flowers, 387 U.S. 97 (1967). Trainor and O'Malley are not charged with execution or enforcement of the Illinois Act, but merely utilized the Act in the capacity of private creditors.[2/] While the claim against these defendants was heard by the three-judge court under its pendent jurisdiction, direct appeal to this Court of only the pendent claim is improper since it has no independent

2/ Appellants' suggestion on pages 8-9 and 12 of their Jurisdictional Statement that they, as state officials, enjoy some special constitutional considerations in employing a statute designed for general creditor use is clearly without merit. As the three-judge court noted in its decision, "...it is mere happenstance that the State of Illinois was the petitioner..." In employing the statute in the position of a private party, Trainor and O'Malley are appealing in the same capacity here.



jurisdictional base. Pittsburg and W.Va. Railway Co. v. U.S., 281 U.S. 470 (1929); Perez v. Ledesma, 401 U.S. 82, 86-87 (1971).

Nor does this court have jurisdiction of this appeal because of the injunctions entered by the three-judge court against Finley and Elrod. As noted above (Argument I, supra), Finley and Elrod chose not to appeal those injunctions. Absent such an appeal, the case before this court is in the same posture as if an injunction had been secured solely against Trainor and O'Malley. Since that injunction was not required to be heard by a three-judge court, this Court does not have jurisdiction pursuant to 28 U.S.C. §1253.

B. A Three-Judge Court Was Not Required To Hear This Lawsuit Since The Illinois Attachment Act Was Found To Be Patently And Flagrantly Unconstitutional And Therefore It Is Not Directly Appealable Pursuant To 28 U.S.C. §1253.

Dismissal of the appeal is further dictated by this Court's decision in Bailey v. Patterson, supra. In Bailey a three-judge court was convened to hear a constitutional challenge to a state statute requiring racial segregation on common carriers. The district court abstained and the plaintiffs took a direct appeal to this Court pursuant to 28 U.S.C. §1253. This Court, after noting that the constitutional issue had been settled beyond question, stated that "three-judges are...not required when, as here, prior decisions make friviolous any claim that a state statute on its face is not unconstitutional." 369 U.S. at 33. Since the case was therefore not one "required...to be heard and determined by a district court of three judges," it could not be appealed pursuant to 28 U.S.C. §1253. Id. at 34.[3/]

In the instant case a three-judge court found the Illinois Attachment Act to be "patently and flagrantly violative of the Constitution," 405 F. Supp. at 762 and "on its face

3/ See also, Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 97, n.14 (1974), in which the Court analyzed generally its narrow construction of the Three-Judge Court Act and stated that it had previously "...held that three judges are not in fact necessary where the unconstitutionality of the statute is obvious and patent, Bailey v. Patterson, supra..."

patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution." Id. at 762. This decision was reached after review of prior decisions of this Court which set forth the due process requirements for summary creditor statutes such as the Illinois Act. See, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing, Inc. v. Di-Chem Inc., 419 U.S. 601 (1975). While this decision was rendered after the three-judge court had already been convened, the court clearly could have dissolved itself under Bailey and remanded the case to a single judge. When, as here, a three-judge court decides a case on grounds "which would have justified dissolution of the court...or a refusal to request the convention of a three-judge court ab initio, review...is available in the Court of Appeals." Gonzalez v. Automatic Employees Credit Union, 419 U.S. at 101. Thus, this Court does not have jurisdiction of this appeal.

With increasing frequency, due in part to the staggering workload of the federal judiciary, single judges are holding statutes unconstitutional without convening three-judge courts when the statutes are found to be patently unconstitutional. See, e.g., Anderson v. Nemetz, 474 F.2d 814 (9th Cir. 1973); Aiona v. Pai, 516 F.2d 892 (9th Cir. 1975); Hank v. Fenner, 396 F. Supp. 1 (D.S.D. 1975). As the court noted in Utica Mut. Ins. Co. v. Vincent, 375 F.2d 129, 131 n.1 (2nd Cir.) cert. denied, 389 U.S. 839 (1967), "...Congress could not have intended to require three judges to be assembled when the decision could not possibly go in any manner save one."

A district court decision in Texas illustrates the appropriateness of a single judge rendering a decision on a statute raising similar constitutional questions as the Illiinois

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Attachment Act.[4/] In Garcia v. Krausse, 380 F. Supp. 1254 (S.D. Tex. 1974), the Court struck down the Texas sequestration statute holding that the statute's clearly unconstitutional failure to comply with prior notice and hearing requirements of Fuentes v. Shevin, supra, and failure to meet the standards of Mitchell v. W.T. Grant Co., supra, obviated the necessity for a three-judge court. With this Court's recent affirmation of Fuentes and Mitchell in North Georgia, the propriety of a single judge striking down statutes such as the Texas and Illinois Acts is even more apparent.

For the foregoing reasons Appellees submit that the case against Appellants Trainor and O'Malley was not one required to be heard by a three-judge court and therefore direct appeal does not lie to this Court pursuant to 28 U.S.C. §1253.

III

IN THE ALTERNATIVE, THE JUDGMENT BELOW SHOULD BE AFFIRMED ON THE GROUNDS THAT THE QUESTIONS PRESENTED ARE SO UNSUBSTANTIAL AS NOT TO WARRANT FURTHER CONSIDERATION.

A. The Illinois Attachment Act Is Patently Violative Of The Due Process Clause Of The Fourteenth Amendment.

The district court found the Illinois Attachment Act to be on its face patently violative of the due process clause of the Fourteenth Amendment. In the court's view the Act does not provide for a pre-seizure hearing as required by Fuentes v. Shevin, 407 U.S. 67 (1972), nor does it provide the alternative safeguards to protect the debtor from wrongful seizure of his property approved by this Court in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Specifically, the Court found the Illinois Act lacking three crucial safeguards which were present in the Louisiana sequestration statute upheld in Mitchell:

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4/ The Texas statute is similar to the Illinois statute under attack here in that it contains the same constitutional defects: it does not require the creditor to set forth specific facts in his affidavit justifying the issuance of a writ, it provides for no judicial supervision, and it does not provide for an immediate post-seizure hearing.

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1. The Illinois Act does not require the creditor to set out specific facts in his affidavit which would entitle him to relief, but authorizes a writ to issue upon conclusory allegations in verbatim statutory language coupled with certain procedural information.

2. A creditor need not present a factual affidavit to a judge for determination of whether a writ should issue, but instead a writ will automatically issue from the clerk of the court who has no authority to determine the factual sufficiency of the affidavit.

3. The Act does not provide for an immediate post-seizure hearing, but only a hearing on application by the debtor at some uncertain time in the future to be set at the convenience of the court.

The district court's decision is clearly in line with the decisions of this Court which have set forth the due process requirements for summary creditor remedies. Sniadach v. Family Finance Corp., 397 U.S. 254 (1969); Fuentes v. Shevin, supra; Mitchell v. W.T. Grant Co., supra; North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). In these cases this Court has made it patently clear that an alleged debtor must be given either prior notice and hearing or certain alternative procedural safeguards before a creditor can bring about the seizure of the debtor's property by State authorities. Extended argument is not necessary to show that the Illinois Act fails in important respects to meet the due process standards set forth by this Court. Plenary consideration is therefore not warranted and the decision of the district court should be summarily affirmed.

Notwithstanding the patent defects in the Illinois Act, appellants attempt to persuade this Court that the procedures authorized by the Illinois Act compare favorably with those upheld in Mitchell. A comparison of the Louisiana sequestration statute scrutinized in Mitchell with the Illinois Attachment Act shows that appellants' argument is without merit.



In Mitchell, a creditor with a vendor's lien in personal property purchased by the debtor on an installment contract obtained a writ of sequestration of that property pending the outcome of a trial on his contractual claim. Pursuant to the Louisiana sequestration statute the seller filed a petition and affidavit setting forth factual allegations which supported the grounds for issuance of the writ. The application was made to a judge who was required to examine the affidavit to determine whether the alleged facts constituted adequate grounds for the sequestration. The issue at this stage of the proceeding was simply whether the creditor or the debtor was entitled to possession pendente lite. Since the issue of possession turned on uncomplicated matters that were amenable to documentary proof - the existence of the debt, the lien, and the delinquency - the court reasoned that an ex parte hearing was adequate. 416 U.S. at 609. However, the time which the property was subject to ex parte seizure was cut to a bare minimum by an express statutory provision allowing the debtor to move for an immediate post-seizure hearing.

In contrast to the installment seller in Mitchell, the Illinois attachment creditor need not have or allege any current lien, mortgage, or other legally cognizable interest in the property subject to attachment. Instead the creditor has a virtually unlimited power to initiate a seizure by the sheriff of any and all goods of an alleged debtor to be held for satisfaction of a possible future judgment. Such a power gives the creditor great leverage for a favorable settlement of his claim, especially where, as in the present case of a low-income debtor, the debtor is unable to obtain a bond for the release of his property.

This extraordinary remedy is available to an alleged creditor merely by filing an affidavit with a court clerk which sets forth certain grounds for the attachment in broad

conclusory language. In the instant case the creditor obtained an attachment by filing an affidavit on a preprinted form supplied by the clerk of the circuit court which set forth in verbatim statutory language the allegation that the plaintiffs "within two years prior to the filing of this affidavit fraudulently concealed or disposed of their property so as to hinder or delay their creditors." Neither in the affidavit nor in the complaint filed therewith did the creditor set forth specific factual allegations which constitute fraud under the Illinois law.[5/] Furthermore, the creditor did not, nor was he required to, allege any facts demonstrating extraordinary circumstances necessitating any ex parte seizure. See, Fuentes v. Shevin, supra at 73.[6/] While appellants contend that attachment without prior notice is necessary to prevent a debtor from concealing his property or leaving the jurisdiction, these grounds were not alleged in their affidavit or complaint. Even when such grounds are alleged by a creditor, the Act does not require supportive facts.

Based upon the creditor's affidavit a writ of attachment was issued by a clerk of the court who had no authority to review the factual basis of the affidavit to determine whether a

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5/ In Illinois the specific factual elements of fraud must be pleaded. Tate v. Jackson, 22 Ill. App. 2d 471, 161 N.E. 2d 156 (1959); Attwood Vacuum Mach. Co. v. Continental Casualty Co., 107 Ill. App. 2d 248, 246 N.E. 2d 882 (1969).

6/ Appellants' contention that the present case is an "extraordinary situation" is without merit under Fuentes since the facts which might constitute such an extraordinary situation were never alleged in state court. Furthermore, the Act is not narrowly limited to such situations but is instead a general creditor remedy. The fact that in the present case the Act was utilized by a government agency to collect monies allegedly due the state does not render it any less defective.



writ should issue.[7/] Compare, Hutchison v. Bank of North Carolina, 392 F. Supp. 888, 896 (N.D. N.C. 1975)(three-judge court). Judicial review of the petititon for the writ is especially crucial in this case since the grounds set forth in the Illinois Act are made up of numerous subjective elements, such as intent and scienter, which are not amenable to documentary proof. See, Mitchell v. W.T. Grant Co., supra at 617. Nor does the debtor have the right to a judicial hearing immediately after the seizure. If the debtor answers the creditor's affidavit under §27 of the Act he may get a hearing on the attachment issue on the return date (ten to sixty days after the date of the writ) or at some later date set at the convenience of the court.[8/] However, there is no express provision in the Act whereby the creditor can move for an immediate post-seizure hearing and thereby cut to a bare minimum the length of the ex parte deprivation. See, Hecht v. Feldman, 153 Ill. 390, 398,39 N.E. 121 (1894).

In light of these considerations there is no question that the court below was correct that the Illinois Attachment Act is on its face patently and flagrantly unconstitutional. The court's decision is consistent with numerous federal and state courts which have struck down similar statutes on the

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7/ Appellants contend that when the action sounds in tort, the creditor must apply to a judge for the writ of attachment. (Juris. Stat. at 13,17). Appellants, however, misconstrue the Act. The Act provides that the judge shall examine the creditor concerning the cause of action, (not the grounds in the affidavit) and he then endorses upon the affidavit the amount of damages for which the writ shall issue. As the court below recognized this provision is "limited only to the question of potential damage and determination of limit on the amount of property to be attached. The judge is not required to evaluate the legal sufficiency of sworn fact as was the case in Mitchell." In any case, the present attachment was filed as a contract and issued by a clerk without any judicial participation.

8/ In the present case, when plaintiffs appeared with their attorneys on the return date with their counteraffidavit, they were informed that the case had already been continued pursuant to a practice of that court whereby attachment cases were routinely heard thirty days after the return date.

authority of Fuentes, Mitchell, and North Georgia.[9] Since this appeal raises no substantial issues which have not been settled beyond question, further review by this Court is unwarranted.

B. The District Court Did Not Err In Its Decision That The Principles Of Younger v. Harris and Huffman v. Pursue, Ltd. Are Not Applicable To This Suit.

The district court found that Younger v. Harris, 401 U.S. 37 (1971), and Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) did not prevent it from granting plaintiffs the declaratory and injunctive relief requested. The court viewed Huffman as a limited extension of the Younger doctrine of non-interference with state criminal prosecutions to an Ohio civil nuisance proceeding which was in aid of and closely related to criminal statutes. 405 F. Supp. at 760. It found that in contrast to the Ohio nuisance proceeding, the Illinois Attachment Act did not give an exclusive right of action to the state in order to effectuate policies embodied in its criminal laws, but merely provided for a general cause of action for both public and private creditors. The Court reasoned, "it is mere happenstance that the State of Illinois was the petitioner in this attachment proceeding...or that the pending state proceedings may arguably be quasi-criminal in nature; under the Illinois Attachment Act they need not be." 405 F. Supp. at 760.

The district court was clearly correct that the principles set forth in Huffman are inapplicable to the case at bar. The Illinois Department of Public Aid, plaintiff in the state court attachment suit, had the authority to bring both a criminal prosecution and a civil collection suit against Mr. and Mrs. Hernandez. It chose not to bring a criminal action but only to proceed with the civil suit. Furthermore, it proceeded by way of attachment, a general creditor remedy not limited to

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9/ See, e.g., Jonnet v. Dollar Savings Bank of New York, 44 U.S. L.W. 2377 (Jan. 27, 1976) F.2d (3rd Cir. 1976); Guzman v. Western State Bank of Devils Lake, 516 F.2d 125 (8th Cir. 1975); Bunton v. First Nat'l Bank of Tampa, 394 F. Supp. 793 (N.D. Fla. (1975)(three-judge court); Douglas Research and Chemical, Inc. v. Solomon, 388 F. Supp. 433 (E.D. Mich. 1975)(three-judge court); Garcia v. Krausse, 380 F. Supp. 1254 (S.D. Tex. 1974); Manning v. Palmer, 381 F. Supp. 713 (D. Ariz. 1974)(three-judge court); Thornton v. Carson, 111 Ariz. 490, 533 P.2d 657 (1975).



actions by the state for recoupment of public aid assistance monies. The federal court injunction prevented the Department from utilizing this patently unconstitutional procedure to facilitate collection of its alleged claim. The injunction did not prevent the Department from instituting a criminal prosecution or proceeding with its civil claim, and it is still free to do so. Nor did the injunction interfere in any way with the ability of the state court to adjudicate the merits of the pending civil claim.[10]

The opinion of the district court is consistent with decisions of other federal courts which have extended Younger principles to non-criminal proceedings. In virtually all these cases the federal courts refused to enjoin proceedings in which a governmental body was an indispensable party and which could fairly be characterized as quasi-criminal.[11] On the other hand, no federal court has extended Younger to proceedings between private parties, such as those authorized by the Illinois Act,

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10/ Prejudgment attachment in Illinois is distinct from and independent of the creditor's chief cause of action. Under the reasoning of Lynch v. Household Finance Corp., 405 U.S. 538, 553-555 (1972) and Fuentes v. Shevin, supra at 71, n.3, attachment under the Illinois Act could be characterized as "extrajudicial" and therefore not a pending state court proceeding to which Younger-Huffman would apply. While the district court rejected this position without explanation, appellees submit that it is another ground for upholding the court's decision that Huffman is inapplicable to the present case.

11/ See, e.g., Palaio v. McAuliffe, 466 F.2d 1230 (5th Cir. 1972) (public nuisance proceeding); Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973)(injunction by state to prevent public disorder during school desegregation); Duke v. Texas, 477 F.2d 244 (5th Cir. 1973) (statute authorizing injunction to prevent public disorder where acts enjoined are punishable as misdemeanors); Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427 (2nd Cir. 1975)(disciplinary proceedings against attorney by state bar association); Wallace v. Kern, 520 F.2d 400 (2nd Cir. (state court bail proceedings); McCune v. Frank, 521 F.2d 1152 (2nd Cir. 1975)(county police disciplinary proceedings).

where no more than the private interests of the litigants are at stake.[12/]

The district court also found that the present case falls within one of the exceptions to the Younger-Huffman doctrine since in its view the Illinois Attachment Act was patently and flagrantly violative of the Constitution. As previously noted, the Act conspicuously fails to provide either prior notice and hearing or other procedural safeguards which this Court has now made clear must be present to protect potential debtors from hasty and wrongful seizure of their property. Furthermore, the Act is constitutionally infirm in "whatever manner and against whomever an effort might be made to apply it." See Huffman v. Pursue, Ltd., supra at 671. The Act is so broadly drawn that it could not be interpreted to be limited to those facts or situations which might pass constitutional muster under a more narrowly circumscribed statute.

Even if this Court were to find that the Illinois Act were not so patently unconstitutional as to warrant a federal injunction against the attachment proceedings, appellees submit that the district court's actions were nevertheless appropriate in the present situation. This Court has recognized that the considerations of comity and federalism underlying Younger are inapplicable where litigants are not provided with the "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." Huffman v. Pursue, Ltd., supra at 592, citing Gibson v. Berryhill, 411 U.S. 564, 577 (1973). Here, the very structure of the Illinois Act prevents an attachment

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12/ Federal courts have consistently entertained constitutional challenges to summary creditor remedies where there was a pending state court proceeding. See, e.g., Fuentes v. Shevin, supra; Jonnet v. Dollar Savings Bank of New York, supra; Guzman v. Western State Bank of Devils Lake, supra; Hutchison v. Bank of North Carolina, supra; Douglas Research and Chemical, Inc. v. Solomon, supra; Garcia v. Krausse, supra; Manning v. Palmer, supra; Schneider v. Margossian, 349 F. Supp. 741 (D.Mass. 1972) (three-judge court).

debtor from raising either his federal or state claims until after his property has been attached.

In the instant case the first scheduled hearing on the attachment was forty-four days after the credit union was served with the writ of attachment. Furthermore, had the court found against the plaintiffs at that time on their constitutional claim, under Illinois civil procedure there would have been no right to an interlocutory appeal prior to a final judgment on the merits of the case in chief. Smith v. Hodge, 13 Ill. 2d 197, 148 N.E.2d 793 (1958). Once there is a final judgment the property is either returned to the debtor or delivered to the creditor to satisfy the judgment, thereby rendering an appeal of the constitutional claim an essentially useless act. During this entire period of time the debtor has been deprived of his property without due process of law. In light of this inadequate and cumbersome procedure plaintiffs chose to raise their constitutional claims in the district court where they received an immediate hearing on their request for temporary relief and as a result obtained a release of one-half of their funds.

The district court, then, was clearly correct that Huffman did not prevent it from enjoining the operation of a patently unconstitutional statute. Furthermore, its decision is consistent with those of other federal courts which have extended the principles of Younger and Huffman to civil proceedings, quasi-criminal in nature. Further review by this court is therefore not warranted.

## CONCLUSION

For the foregoing reasons appellees submit that this appeal presents no case or controversy and further that this Court

has no jurisdiction of the appeal. In the alternative, appellees believe that the questions presented by this appeal are so unsubstantial as not to warrant plenary consideration by this Court. Appellees therefore respectfully request that this Court dismiss the appeal or, in the alternative, that it affirm the judgment below.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

## No. 75-1407

JAMES TRAINOR, et al.,

*Appellants,*

vs.

JUAN HERNANDEZ, et al.,

*Appellees.*

**On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division**

## BRIEF AND ARGUMENT OF APPELLANTS JAMES TRAINOR AND VIVIAN O'MALLEY

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IN THE

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OCTOBER TERM, 1975

**No. 75-1407**

JAMES TRAINOR, et al.,

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JUAN HERNANDEZ, et al.,

*Appellees.*

**On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division**

## BRIEF AND ARGUMENT OF APPELLANTS JAMES TRAINOR AND VIVIAN O'MALLEY

### OPINION BELOW

The opinion of the district court (A. 68-77) is reported at 405 F. Supp. 757.

### JURISDICTION

Appellees brought this class action under 28 U.S.C. § 1343 (3) and (4) and 42 U.S.C. § 1983, seeking to have the district court declare invalid and enjoin the enforcement of

the Illinois Attachment Act, on the ground that the procedures provided for by that Act deprived appellees of their property without due process of law in violation of the fourteenth amendment to the United States Constitution. A three-judge court, convened pursuant to 28 U.S.C. §§ 2281 and 2284, entered its judgment on December 15, 1975, granting appellees the relief sought.

Appellants filed their notice of appeal in the district court within the 60-day period provided for by 28 U.S.C. § 2101(b), on February 3, 1976 (A. 79), and filed their jurisdictional statement on April 3, 1976. This Court noted probable jurisdiction on June 7, 1976. Jurisdiction of the Supreme Court of the United States to review this case by direct appeal is conferred by 28 U.S.C. § 1253.

## STATUTE INVOLVED

The Illinois Attachment Act, Illinois Revised Statutes, Chapter 11 is reprinted in the Appendix (A. 28-49).

## QUESTIONS PRESENTED

1. Whether the principles of *Younger* v. *Harris*, 401 U.S. 37 (1971), and *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), apply to the present case, where appellees sought to have the federal district court enjoin appellants—state officials—from prosecuting a pending attachment proceeding against appellees in the Illinois courts.

2. Whether the procedures provided for by the Illinois Attachment Act, Illinois Revised Statutes 1973, Chapter 11, afford appellees—attachment debtors—due process of law.



## STATEMENT OF THE CASE

Appellees Juan and Maria Hernandez brought this class action in the district court challenging the constitutionality of the Illinois Attachment Act (A. 28-49) after the State of Illinois, on the relation of the Illinois Department of Public Aid, instituted attachment proceedings against them in the Illinois courts. The Department filed its state suit to attach monies on deposit in appellees' credit union accounts on the ground that appellees applied for and received public assistance while fraudulently concealing the existence of those accounts.

The Illinois Attachment Act provides that a creditor having a money claim may attach the property of his debtor on any one of nine narrow grounds, all of which focus on circumstances which give a creditor cause for insecurity, either because of fraudulent conduct on the part of the debtor or the debtor's absence from the State (§1) (A. 28-29). A creditor is entitled to a writ of attachment if he files with the clerk of the court an affidavit setting forth the nature and amount of the claim and one of the nine circumstances set forth in section one (§2) (A. 29-30). In cases sounding in tort the creditor is required to be examined under oath by a judge concerning the cause of action (§2) (A. 29-30). Except where an agency of the State is involved, the creditor is required to furnish a bond in double the amount of the claim or double the amount of the property to be attached (§§ 4a, 4b) (A. 31-32).

Upon filing of a proper affidavit and the posting of bond, the clerk issues a writ of attachment directed to the sher-

iff, who executes the writ and also serves it upon the debtor (§§ 6, 8, 10) (A. 33-36). The writ is returnable and the debtor must appear or answer on a date set by the creditor, which date shall not be less than ten nor more than sixty days from the date of the writ (§§ 6, 25) (A. 33, 43). The creditor must file his complaint ten days before the return day, and if he does not do so within five days after the return date, the suit is subject to dismissal (§25) (A. 43). The debtor may at his option contest the attachment by a motion to quash, answer the creditor's claim on the merits (§27) (A. 44), or file any other paper appropriate to a civil proceeding (§26) (A. 43), such as a motion to dismiss. The burden of proof of establishing the propriety of the attachment and the underlying claim is upon the creditor. If the attachment is found to be wrongful, the debtor may recover damages and costs (§§ 4a, 27) (A. 31, 44).

The debtor also has the right to retain or recover possession of the property in question by posting a bond in double the value of the property or in the amount of the debt (§§ 14, 15) (A. 38). In absence of this bond, the sheriff retains custody of the attached property (§ 14) (A. 38) until the debtor successfully attacks the attachment or the underlying claim is adjudicated. In the case of garnishment, the garnishee must withhold the property from the debtor (§ 21) (A. 41).

The Illinois Department of Public Aid brought its attachment suit on October 30, 1974, pursuant to section 11-21 of the Illinois Public Aid Code (A. 26), which authorizes the Department to bring a civil and/or criminal action against any aid recipient who has concealed facts which



would affect his eligibility for financial aid. The Department filed both the required affidavit and its complaint, which alleged that appellees had fraudulently concealed the existence of monies in their credit union accounts, and that as a result, the Department had provided public assistance in the amount of $3,720.00, for which they were not eligible (A. 14-20).

The writ of attachment (A. 21-23) was thereupon issued and executed against the accounts on November 5, 1974. Appellees were served with the writ, complaint, and affidavit on November 8, 1974. They appeared on the return date, which had been set for November 18, 1974, but were informed that the matter had been continued until December 19, 1974 (A. 9-10).

Appellees then brought the present action in the district court on December 2, 1974, on behalf of themselves and all others "who have had or may have their property attached without notice or hearing upon a creditor's mere allegation of fraudulent conduct pursuant to the Illinois Attachment Act" (A. 6-7), attacking the validity of the Illinois Act and asking for injunctive relief. They asserted that the Illinois Act violates the due process clause in that it authorizes creditors to attach the assets of debtors upon allegations of fraudulent conduct (§1, parts sixth through ninth (A. 28-29)) without judicial review and without prior notice or an opportunity to be heard (A. 10-11). Appellees prayed that the Clerk of the Circuit Court of Cook County, as an individual defendant, and all other clerks for the judicial circuits of Illinois, as class defendants, be enjoined from issuing such writs; that the Sheriff of Cook County, as an individual defendant, and all other county sheriffs in Illinois, as class defendants, be enjoined from executing

such writs; and that appellants Trainor and O'Malley, as agents of the Illinois Department of Public Aid, be enjoined from applying for such writs and from refusing to dismiss the writ of attachment against the appellees' property (A. 12-13).

The appellees also moved for a temporary restraining order requiring appellants to dismiss the writ of attachment and requiring defendant Elrod, as sheriff, to release control of their property (A. 24). In an affidavit in support of this request, appellee Juan Hernandez stated that he needed the money in his credit union account to pay his rent, utility bills, and an automobile repair bill, and to support his family while he went into the hospital for surgery on his back (A. 24-25). Appellants filed a memorandum in opposition to appellees' motion for a temporary restraining order, with supporting affidavits. The affidavits revealed that appellee Juan Hernandez had hospitalization benefits, including sick pay, provided by his employer (A. 50); that appellees had a combined income of more than $15,000 in the first 11 months of 1974 (A. 51); and that appellees had a combined balance of more than $1,600 in their credit union accounts. In their memorandum, appellants also stated that appellees had a total income of more than $10,000 (R. Item 5, p. 12), during the period in which they collected $4,123.76 in public aid benefits (A. 53). The appellees' request for temporary relief was not ruled on because the court persuaded the parties to come to an agreement whereby appellants agreed to release one-half of the attached funds.

A three-judge court was designated pursuant to 28 U.S.C., §2284, on March 21, 1975 (A. 61). The parties filed memoranda on the due process issue after appellants filed



a motion to dismiss (A. 55-56) and appellees cross-filed for summary judgment (A. 57). The district court then directed that additional memoranda be filed in light of this Court's decision in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975) (A. 62). The district court certified this suit as both a plaintiff and defendant class action on October 31, 1975 (A. 63-64).

The district court entered its judgment and opinion on December 15, 1975, granting appellees the relief they had requested (A. 65-77). The court held that *Huffman* v. *Pursue, Ltd.* was inapplicable, because that case was limited to civil proceedings "in aid of and closely related to criminal statutes" (A. 71-72). The court stated:

> In *Huffman,* the State of Ohio proceeded under a statute which gave an exclusive right of action to the state. By contrast, the Illinois Attachment Act provides a cause of action for any person, public or private. It is mere happenstance that the State of Illinois was the petitioner in this attachment proceeding. It is likewise coincidental that the pending state proceedings may arguably be quasi-criminal in nature; under the Illinois Attachment Act, they need not be. These major distinctions preclude this Court from extending the principles of *Younger,* based on considerations of equity, comity and federalism, beyond the quasi-criminal situation set forth in *Huffman* (A. 72).

The court also held that the case fell within one of the express exceptions to *Younger* v. *Harris,* since in the court's view, the Illinois Attachment Act was "patently and flagrantly violative of the constitution" (A. 72).

The court found the Illinois Act (§§ 1, 2, 2a, 6, 8, 10 and 14) unconstitutional because, according to the court, it neither provided for a pre-seizure hearing nor the alter-

native safeguards approved by this Court in *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974) (A. 76-77).

The appellants filed a motion for a stay of injunction pending appeal, which the court denied on February 25, 1976, the Honorable Wilbur F. Pell, Jr., United States Circuit Court Judge, dissenting (A. 81).

## SUMMARY OF ARGUMENT

### I.

The principles of *Younger* v. *Harris* and *Huffman* v. *Pursue, Ltd.* are fully applicable to this case, where appellees brought suit in the federal district court to enjoin a pending attachment proceeding which the Illinois Department of Public Aid instituted against them in the Illinois courts. The district court, thus, should have deferred to the state court and dismissed this case.

The rule that a federal court should not intervene in state criminal prosecutions, except in extraordinary circumstances, is traditional doctrine that this Court clarified in *Younger*. Considerations of equity, comity, and federalism underlie this rule.

Equity counsels that in any suit for injunctive relief a plaintiff must establish that he has no adequate remedy at law, and that absent equitable relief, he will suffer irreparable harm. When a plaintiff seeks to enjoin state court proceedings, the principles of comity and federalism,



which command respect for state functions and which are at the heart of our federal system, come into play. It has traditionally been held in such circumstances that the plaintiff must then establish irreparable harm which is both "great and immediate," which the *Younger* case translated into the extraordinary circumstances requirement. An injunction directed against a state court proceeding is very costly to federal interests, and thus, is only issued in extraordinary circumstances where the state court processes are inadequate to protect the plaintiff. Only in such circumstances should the federal courts assert themselves as the ultimate *guarantor* of federal rights.

There is no question that considerations of equity, comity, and federalism are relevant, regardless of whether the federal suit is to enjoin state criminal or civil proceedings. Prior decisions of this Court, however, have only concerned injunctions against state criminal prosecutions or against proceedings where the State was seeking to enforce a statute with quasi-criminal elements. The district court interpreted this fact as a limitation on the rule of *Younger* and *Huffman*, and thus, enjoined the state proceeding involved in this case.

This supposed limitation of *Younger* and *Huffman* rests on the notion that unless state criminal or quasi-criminal interests are involved, the State's interest is not substantial enough to offend our federal system when federal rights are asserted. The substantiality of the State's interest, however, depends on the state policy involved, and not on the labels "criminal" and "civil." The State's interest is substantial whenever the state courts are called upon to enforce or interpret the State's own substantive rules, and federal court intervention in such circumstances will in

every case be an affront to state legislative and judicial functions. The district court's injunction against a state agency in this case was an embarrassment to executive functions as well. Moreover, one of the state substantive policies involved here—that of the prevention of welfare fraud—is of the utmost importance and provides the quasi-criminal element to which the district court attached such significance.

The district court also found *Younger* and *Huffman* inapplicable because in its view, the Illinois Attachment Act is "patently and flagrantly violative of the constitution." The court, however, misapprehended the nature of this exception to the *Younger* rule. This case does not present an extraordinary circumstance necessary to vitiate the *Younger* rule. This is evident from the fact that appellees could have eliminated the supposed threat to their due process rights by their defense of the state attachment case. The district court applied a "facial invalidity" standard to the Illinois Act, which is insufficient to invoke an exception to the rule of *Younger*.

Appellees' due process rights could have been vindicated quickly and effectively in the state attachment proceeding which gave rise to this case, without embarrassment to the federal system. The district court clearly misapprehended its role as the *guarantor* of federal rights, and for these reasons, its judgment should be vacated.



## II.

In *Mitchell* v. *W. T. Grant Co.* this Court set out the due process standards to be applied to statutes providing for the seizure of a debtor's property. Due process requires only that the State strike a proper balance between creditor and debtor interests. The creditor's interest in preserving property subject to attachment against possible waste or destruction, and the risk of wrongful alienation or concealment if a debtor is forewarned of the attachment are sufficient to justify summary attachments on a creditor's own sworn ex parte application, provided there are procedural safeguards which minimize risk against wrongful seizure.

The safeguards against wrongful attachment provided for by the Illinois Attachment Act parallel those sustained in *Mitchell* in all essential respects. Before a writ of attachment will issue under the Illinois Act, a creditor must file an affidavit setting forth the nature of his claim and its amount, diminished by set-offs and credits, and one of nine narrow circumstances in which an attachment will issue. The facts which give rise to his claim must be set forth specifically under Illinois decisional law, and must be of the affiant's own personal knowledge. If his claim sounds in tort, rather than contract, the creditor must appear before a judge to be examined on his claim. The nine circumstances under which attachment will issue under the Act are narrowly drawn, so that attachment is available only when the creditor will have especially grave concern for his ability to collect on his claim, absent attachment. In this respect the Illinois Act is considerably narrower than the statute in *Mitchell*. The creditor is required to post bond and is liable to the debtor for wrongful attachment. The

debtor's interest is further safeguarded by the fact that the sheriff retains possession of the attached property, whereas in *Mitchell* the creditor was entitled to possession. A debtor may recover his property by posting bond. Finally, the debtor is entitled to an early hearing within sixty days, and may well be able to advance the date of his hearing by proper motion. Thus, under the Illinois Act, the danger of wrongful attachment and the seriousness of the deprivation of the debtor's property have been substantially minimized, and the attachment is allowed only when the risks to a creditor's security are especially serious.

Moreover, there are additional reasons to uphold the application of the Illinois Act to the facts of this case. The prevention of welfare fraud is an important governmental interest, which apart from the other more general considerations outlined above, justifies the summary attachment of the property of the person who has committed the fraud.



## ARGUMENT

### I.

### THE PRINCIPLES OF YOUNGER v. HARRIS AND HUFFMAN v. PURSUE, LTD. REQUIRE THAT THIS SUIT BE DISMISSED.

The same considerations which governed this Court's disposition of *Younger* v. *Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), and *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), are fully applicable here, and dictate that the district court should have dismissed the instant case. Instead of deferring to the Illinois courts which are surely competent to rule on the due process issue presented by the pending state attachment proceeding which gave rise to this case, the district court went to the merits of appellees' constitutional challenge, striking down the Illinois Attachment Act and enjoining appellants—state officials—from proceeding under that Act.

In *Younger* this Court held that absent certain extraordinary circumstances, considerations of equity, comity, and federalism preclude the federal courts from enjoining pending state criminal prosecutions. In *Huffman* the Court made it clear that this doctrine applies in the civil arena as well, at least where the "State is a party to the [pending] proceeding, and the proceeding is both in aid of and closely related to criminal statutes." 420 U.S. at 604, 43 L.Ed.2d at 492. Notwithstanding the facts that the State was the plaintiff in the pending attachment suit involved here and that the State was proceeding in aid of a statute which gave it the option of pursuing criminal and/or civil remedies in cases of welfare fraud, Ill. Rev. Stat. 1973, ch.

23, §11-21, the district court held *Huffman* inapplicable. The basis of the court's holding was that the Illinois Attachment Act provides a civil action available to anyone—public or private—while the statute in *Huffman* "gave an exclusive right of action to the State" and was itself quasi-criminal in nature. The court found it "mere happenstance that the State of Illinois was the petitioner in the attachment proceeding," and "coincidental that the pending state proceeding may arguably be quasi-criminal in nature." (A. 71-72).

It is the State's position that the principles enunciated in *Younger* and *Huffman* are applicable to pending state civil proceedings generally, and to the present case particularly. An examination of the considerations which mandated this Court's holdings in *Younger* and *Huffman* demonstrates that the rule against federal intervention invoked in those cases is applicable to all cases where a federal court is called upon to enjoin state court proceedings, and clearly shows the inappropriateness of the district court's action in this case.

As this Court pointed out in *Huffman*, 420 U.S. at 599-600, 43 L. Ed. 2d at 489-90, the decision in *Younger* was not a novel one, but was a reaffirmation of the Court's holdings in a long line of cases typified by *Fenner* v. *Boykin*, 271 U.S. 240, 70 L. Ed. 2d 927, 46 S. Ct. 492 (1926).[1] Relying on these cases, the Court in *Younger* stated:

[1] These cases, as identified by the Court in *Huffman*, 420 U.S. at 600, 43 L.Ed.2d at 490, are: *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 79 L.Ed. 1322, 55 S.Ct. 678 (1935); *Beal* v. *Missouri Pacific R.R. Co.*, 312 U.S. 45, 85 L.Ed. 577, 61 S.Ct. 418 (1941); *Watson* v. *Buck*, 313 U.S. 387, 85 L.Ed 1416, 61 S.Ct. 962, 136 A.L.R. 1426 (1941); *Williams* v. *Miller*, 317 U.S. 599, 87 L.Ed 489, 63 S.Ct. 258 (1942); *Douglas* v. *City of Jeannette*, 319 U.S. 157, 87 L.Ed. 1324, 63 S.Ct. 877 (1943).



> This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions.

401 U.S. at 45, 27 L. Ed. 2d at 676. Federal interference is justified only "under extraordinary circumstances where the danger of irreparable loss is both great and immediate". *Huffman*, 420 U.S. at 600, 43 L. Ed. 2d at 490, citing *Fenner* v. *Boykin*, 271 U.S. at 243, 70 L. Ed. at 927; *Younger*, 401 U.S. at 45, 27 L. Ed. at 676.

The most basic source of this rule lies in the requirements for pleading any cause of action in equity. *Douglas* v. *City of Jeannette*, 319 U.S. 157, 162, 87 L. Ed. 1324, 1328, 63 S. Ct. 877 (1943). The plaintiff must establish that he has no adequate remedy at law, *Huffman*, 420 U.S. at 600-01, 43 L. Ed. 2d at 490, citing *Younger*, 401 U.S. at 43, 27 L. Ed. 2d at 675, and that he will suffer irreparable harm in the absence of equitable relief, *Huffman*, 420 U.S. at 601, 43 L. Ed. 2d at 490-91, citing *Younger*, 401 U.S. at 46, 27 L. Ed. 2d at 676. The especially stringent requirement that equitable relief will still not be available except in extraordinary circumstances arises in the context of a suit to enjoin state court proceedings. This requirement of extraordinary circumstances is directly traceable to and is dictated by the principles of comity and federalism. *Younger*, 401 U.S. at 46, 27 L. Ed. 2d at 676; *Lynch* v. *Snepp*, 472 F. 2d 769, 772 (4th Cir. 1973), *cert. denied*, 415 U.S. 983, 39 L. Ed. 2d 880, 94 S. Ct. 1576 (1974); see *Douglas* v. *City of Jeannette*, 319 U.S. at 162-63, 87 L. Ed. 2d at 1329; *Fenner* v. *Boykin*, 271 U.S. at 243-44, 70 L. Ed. at 927.

While some of the cases cited above also found support in the maxim that courts of equity do not ordinarily en-

join criminal prosecutions, *e.g., Douglas* v. *City of Jeannette,* 319 U.S. at 163, 87 L. Ed. at 1329, it is clear that this maxim was not necessary to the reasoning or the holdings of those cases. The requirement of irreparable harm arises in any suit for an injunction, and the requirement of extraordinary circumstances arises out of a regard for state functions. This was clearly recognized in *Huffman,* where this Court stated:

> The seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence. For example, *Massachusetts State Grange* v. *Benton,* 272 U.S. 525, 71 L. Ed. 387, 47 S. Ct. 189 (1926), involved an effort to enjoin the operation of a state daylight savings act. Writing for the Court, Mr. Justice Holmes cited *Fenner* v. *Boykin, supra,* and emphasized a rule that "should be very strictly observed," 272 U.S., at 529, 71 L. Ed. 387, "that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." *Id.,* at 527, 71 L. Ed. 387.

420 U.S. at 603, 43 L. Ed. 2d at 492.

The great degree of deference to state functions which the above cases require is fundamental to our federal form of government. The notions of federalism and comity[2] which

[2] While it is recognized that "comity" and "federalism" may be defined separately, the concepts overlap to such an extent that any attempt to do so comprehensively is unnecessary here. It would seem that comity is a more general concept since it en-

(footnote continued on following page)



this Court termed as the most vital to its decisions in *Younger* and *Huffman* are

> a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

*Younger,* 401 U.S. at 44, 27 L. Ed. 2d at 675; *accord, Huffman,* 420 U.S. at 601, 43 L. Ed. 2d at 490.

compasses the deference or respect which any jurisdiction accords to the law of another. Federalism would seem to be the institutionalization of comity into our government via the Constitution. It additionally connotes the function of our federal government as the ultimate guarantor of federal rights.

In *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970), this Court outlined the constitutional and Congressional foundation for federal deference to state court proceedings, as follows:

> When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. But those powers that were not surrendered were retained by the States and unless a State was restrained by "the supreme Law of the Land" as expressed in the Constitution, laws, or treaties of the United States, it was free to exercise those retained powers as it saw fit. One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies. . . .
>
> While the lower federal courts were given certain powers in the [Judiciary Act of 1789], they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts. Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. Understandably this dual court system was bound to lead to conflicts and frictions. Litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success. Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and "to prevent needless friction between state and federal courts," *Oklahoma Packing Co.* v. *Gas Co.,* 309 U.S. 4, 9, 84 L. Ed. 537, 540, 60 S. Ct. 215 (1940), it was necessary to work out lines of demarcation between the two systems. Some of these limits were spelled out in the 1789 Act. Others have been added by later statutes as well as judicial decisions.



398 U.S. at 285-86, 26 L. Ed. 2d at 240-41.

The Court went on to state:

> Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.

398 U.S. at 287, 26 L. Ed. 2d at 241. See 28 U.S.C. §1257.

The specific ways in which federal intervention in state court proceedings violates principles of comity and federalism have been identified many times. Such intervention results in duplicative legal proceedings, which runs directly contrary to the present day need for judicial efficiency. *Steffel* v. *Thompson,* 415 U.S. 452, 462, 39 L.Ed. 2d 505, 516, 94 S.Ct. 1209 (1974); *Lynch* v. *Snepp,* 472 F. 2d at 774. It reflects negatively on the state court's ability and good faith in enforcing constitutional rights. *Huffman,* 420 U.S. at 604, 43 L.Ed.2d at 492; *Lynch* v. *Snepp,* 472 F.2d at 774. In this regard, the *Huffman* Court expressly refused to assume that state courts would fail to execute their constitutional responsibilities. 420 U.S. at 611, 43 L.Ed.2d at 496; *accord, Cousins* v. *Wigoda,* 463 F. 2d 603 at 607, 608 (7th Cir. 1972), *application for a stay denied,* 409 U.S. 1201, 34 L.Ed.2d 15, 92 S.Ct. 2610 (1972). Most importantly, federal intervention prevents the State from effectuating its substantive policies and continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections to those

policies. *Huffman,* 420 U.S. at 604, 43 L.Ed.2d at 492. The cutting short of the state proceeding is especially serious in this context where the statute involved is capable of judicial narrowing in light of constitutional principles, as is the statute involved in this case. *Huffman,* 420 U.S. at 609, 43 L.Ed.2d at 495.

It should be apparent that the above considerations are fully applicable to this case. Appellees had the opportunity in the state court to assert the same constitutional objections which they presented to the federal district court, by filing a motion to quash or a motion to dismiss, which would have come on for hearing no later than December 19, 1974—nearly a full year before the decision in this case. Such a course would have avoided dual proceedings and would most certainly have saved the court as well as the parties a great deal of time. This is especially so in view of the fact that a three-judge court had to be convened. The State would also have been given the opportunity to rule on its own substantive policies in light of this Court's recent due process decisions dealing with summary seizures of property. Notwithstanding the fact that the district court held the Illinois Act to be "patently and flagrantly violative of the constitution," there is ample room for judicial construction within the Act to bring it within this Court's holding in *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974).

The district court found the principles of *Younger* and *Huffman* to be inapplicable in the present case, since in that court's view, the rule of those cases was limited to criminal proceedings or proceedings "in aid of and closely related to criminal statutes." This supposed bar to the applicability of *Younger* and *Huffman* to civil proceedings apparently rests on the State's paramount interest in



defining crimes, and the additional protections afforded defendants in a criminal prosecution. *Huffman,* 420 U.S. at 614, 615, 43 L.Ed.2d at 498, 499, dissenting opinion. According to this view, the federal court's role as the ultimate guarantor of federal rights is outweighed by principles of equity, comity, and federalism only when the State's interest in the proceeding is especially important and the defendant has procedural guarantees beyond those which attach to civil proceedings. The latter reason has been wholly undercut by *Huffman* where only civil procedural guarantees were involved. Furthermore, while civil proceedings offer fewer procedural guarantees, the federal interest in such proceedings is correspondingly diminished by the fact that the potential impact on federal rights is lessened where criminal sanctions are not involved. As to the supposition that the State's interest is paramount or substantial only when criminal prosecutions are involved, it is more likely the case that the substantiality of the State's interest depends on the specific policy involved rather than on the labels "criminal" or "civil". *Anonymous* v. *Association of the Bar of the City of New York,* 515 F. 2d 427, 432 (2d Cir. 1975), *cert. denied* 423 U.S. 863, 46 L. Ed.2d 92, 96 S.Ct. 122 (1975); *Lynch* v. *Snepp,* 472 F.2d at 773; *Duke* v. *Texas,* 477 F.2d 244, 248 (5th Cir. 1973), *cert. denied,* 415 U.S. 978, 39 L. Ed. 2d 874, 94 S.Ct. 1565 (1974); *Cousins* v. *Wigoda,* 463 F.2d at 606; *Palaio* v. *McAuliffe,* 466 F.2d 1230, 1232-33 (5th Cir. 1972); *Fisher* v. *Federal National Mortgage Ass'n,* 360 F.Supp. 207, 210 (D. Md. 1973). It would surely seem that any policy which the State feels is important enough to codify is sufficient to invoke the principles of comity and federalism. But even assuming that principles of *Younger* and *Huffman* are not applicable to civil proceedings generally, they should certain-

ly be applied in the present case where the State was a party to the proceeding and the strong state policy of combatting welfare fraud was involved.

The district court was able to avoid the *Huffman* doctrine only by focusing in on its supposed limited applicability to civil cases which are quasi-criminal, and then applying the supposed limitation to a case which might have been brought under the Illinois Act. Because of the nature of the considerations which gave rise to *Younger* and *Huffman,* however, it would seem that the limitation of *Huffman,* if valid at all, should be applied only to the specific proceeding before the court. In other words, the principles of *Younger* and *Huffman* apply to the instant case because the State is a party and the state civil proceeding involved is in aid of a criminal statute. Considerations of equity, comity, and federalism are no less applicable to the present case merely because a private party could have brought a strictly civil action under the Illinois Act.

The extraordinary circumstances in which *Younger* and *Huffman* do not apply (and which help preserve the federal court's function as the ultimate guarantor of federally secured rights) are not present in this case. There is absolutely no indication of bad faith or harassment in this suit. Nor is there any indication of irreparable injury, much less irreparable injury which is "great and immediate." The appellees had an income of approximately $15,000 in the ten months preceding the attachment of the funds in their credit union account (A. 51). They also had adequate and speedy remedies available to them in the state court to defeat the attachment. The district court made no finding of irreparable injury, and in view of the above circumstances, for this reason alone the district court should have dismissed this case.



The district court did hold that the Illinois Act was "patently and flagrantly violative of the constitution." It is apparent, however, the court misconstrued the nature of this exception to *Huffman.* The extraordinary circumstances in which considerations of equity, comity, and federalism yield to the federal court's interest in guaranteeing federal rights rest on a determination that the state court processes are wholly inadequate to protect a party's federal right, or that the very bringing of the state suit results in the necessary injury. *Younger,* 401 U.S. at 56, 27 L.Ed.2d at 682, concurring opinion; *Lynch* v. *Snepp,* 472 F. 2d at 775. Where the threat to federally protected rights can be erased by the defense of a single prosecution, the injury asserted by a plaintiff is not irreparable. *Younger,* 401 U.S. at 46, 27 L.Ed.2d at 677. Furthermore, it is clear from the district court's opinion that the district court applied an unconstitutional "on its face" standard, which is insufficient to overcome the rule of *Younger* and *Huffman. Younger,* 401 U.S. at 53, 27 L.Ed.2d at 681. The proper standard is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Huffman,* 420 U.S. at 611, 43 L.Ed.2d at 496. Assuming *arguendo,* that the application of the Illinois Act here violates appellees' due process rights,[3] it is not difficult to imagine situations and constructions of the Illinois Act which would pass

[3] In light of Argument II, *infra,* which demonstrates the close similarities between the Illinois Act and the sequestration statute which this Court upheld in *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600 (1974), it is impossible to see how the district court reached the conclusion that the Act was patently and flagrantly unconstitutional.

constitutional muster, especially where the underlying debt sounds in tort and a pre-attachment appearance before a judge is, therefore, required. Moreover, the Act applies to actions already commenced, where the debtor is before the court and has had an opportunity to answer the creditor's complaint. In such circumstances, appellees' due process objections would be totally inapplicable.

There is very little to support the district court's injunction in this case. Appellees' due process rights could have been vindicated more expeditiously and as effectively in the state court, with no embarrassment to the federal system. It is at least questionable whether appellees even stated an equitable cause of action, must less one so compelling that it was necessary to interfere with state court proceedings. And without in any way minimizing the importance of federal due process rights, it should be noted that these rights rarely call into play the strict scrutiny of the federal courts, as is the case with first amendment rights, for instance. The district court went far beyond its function as an ultimate *guarantor* of federal rights, and should have dismissed this suit.

## II.

### THE PROCEDURES PROVIDED FOR BY THE ILLINOIS ATTACHMENT ACT COMPORT WITH PRINCIPLES OF DUE PROCESS OF LAW.

Assuming *arguendo,* that the Court finds that the principles of *Younger* and *Huffman* should not be applied in this case, the district court's judgment should be reversed because the provisions of the Illinois Attachment Act afford appellees due process of law. The procedures in question here closely parallel those upheld by this Court in



*Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974). The district court's decision, however, effectively restricted the holding of *Mitchell* to the facts of that case. The court characterized *Mitchell* as "an exception to the pre-seizure hearing rule promulgated in *Sniadach* and *Fuentes*" (A. 73), rather than regarding it as setting forth the proper approach to be followed in resolving due process issues. Specifically, the district court did not apply the traditional due process balancing of interests test to the facts of this case, as is required by the *Mitchell* decision.

In *Mitchell* this Court upheld a Louisiana statute which provides for sequestration of property where "one claims the ownership or right to possession of property . . . if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." Under the statute a writ of sequestration issues "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts." The creditor is required to make this showing before a judge. He may do so, however, on ex parte application, without notice to the debtor or an opportunity for the debtor to be heard. The debtor is entitled to seek immediate dissolution of the writ, which must be ordered, unless the creditor "proves the grounds upon which the writ was issued." 416 U.S. at 605-06, 40 L.Ed.2d at 412-13.

The creditor in *Mitchell* filed suit alleging default in payment on an installment sales contract and requested that the property over which it had a vendor's lien be sequestered. The creditor asserted that it had reason to believe that the debtor would "encumber, alienate or otherwise dispose of

the merchandise described in the foregoing petition during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises." Based on the creditor's petition and affidavit, a Louisiana state court ordered, without prior notice or an opportunity for the debtor to be heard, that the property be sequestered. The property was seized on February 7, 1972, and on March 3rd, the debtor attacked the sequestration as violative of his due process rights. The court upheld the sequestration on March 16th, which decision was affirmed by the Supreme Court of Louisiana. 416 U.S. at 601-03, 40 L.Ed.2d at 410-11.

In upholding the Louisiana statute, this Court weighed all of the competing interests involved, making it clear that the State is entitled to recognize the interests of both the creditor and the debtor and to afford the creditor meaningful protection. 416 U.S. at 608, 40 L.Ed.2d at 414. In marked contrast to the approach followed by the district court in the present case, this Court in *Mitchell* specifically disavowed any notion of fixed requirements of procedural due process:

> The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." *Inland Empire Council* v. *Millis,* 325 U.S. 697, 710, 89 L. Ed. 1877, 65 S. Ct. 1316 (1945). Due process of law guarantees "no particular form of procedure; it protects substantial rights." *NLRB* v. *Mackay Co.,* 304 U.S. 333, 351, 82 L. Ed. 1381, 58 S. Ct. 904 (1938). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961); *Stanley* v. *Illinois,* 405 U.S. 645, 650, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972). Considering the Louisiana procedure as a whole, we are convinced that the State has reached a constitutional



> accommodation of the respective interests of buyer and seller.

416 U.S. at 610, 40 L.Ed.2d at 415.

In *Mitchell* the Court found that the possible deterioration or destruction of the property in question, along with the very real risk of concealment or alienation of the property if the debtor is forewarned of the sequestration, to be significant interests of the creditor. These interests, the Court held, outweighed the impact on the debtor of the deprivation of his property, in view of the low risk of a wrongful sequestration under the procedures of the Louisiana statute. 416 U.S. at 610, 40 L.Ed.2d at 415. Reemphasizing the fact that a creditor need only establish the likelihood of success on the merits before seizure of the debtor's property, the Court identified the procedures which it found were in accord with principles of due process of law:

> [I]t seems apparent that the seller with his own interest in the disputed merchandise would need to establish in any event only the probability that his case will succeed to warrant the bonded sequestration of the property pending outcome of the suit. Cf. *Bell* v. *Burson,* 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971); *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, 94 L. Ed. 1088, 70 S. Ct. 870 (1950). The issue at this stage of the proceeding concerns possession pending trial and turns on the existence of the debt, the lien, and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof; and we think it comports with due process to permit the initial seizure on sworn ex parte documents, followed by the early opportunity to put the creditor to his proof. The nature of the issues at stake minimizes the risk that the writ will be wrongfully issued by a judge. The potential damages award available, if there is a successful motion to dissolve the

> writ, as well as the creditor's own interest in avoiding interrupting the transaction, also contributes to minimizing this risk.

416 U.S. at 609-10, 40 L.Ed.2d at 414-15.

In balancing the interests, risks, and statutory safeguards under the Illinois Attachment Act, it seems clear that the scale tips toward the validity of the Act. The creditor must establish the existence of the debt, as well as the need for prompt action, by filing an affidavit setting forth both the nature and amount of his claim, allowing for credits and set-offs, and one of nine narrow and specific circumstances in which an attachment may be had (§§1, 2) (A. 28-29). The affidavit must allege facts unequivocally, and not merely on information and belief. *Brandenburg* v. *Chicago Knitting Co.*, 102 Ill. App. 302 (1902). The specificity necessary for the affidavit to be valid is indicated in the case of *Fisher* v. *Secrist*, 48 F. 264 (1891). In that case the creditor stated in his affidavit that the debtor owed him $24,000 upon covenants in a deed attached to the affidavit. The court held the affidavit insufficient because it failed to recite the facts relied upon as breaches of the covenants, and the damages sustained by each breach.

In the present case appellants specifically set forth the State's claim against the appellees, the amount of that claim, and the grounds for attachment in their attachment complaint, which was incorporated into the affidavit by reference (A. 14-20). The facts alleged in that complaint are clearly as specific as were the facts alleged by the creditor in *Mitchell*, 416 U.S. at 602, 40 L.Ed.2d at 410.

The Illinois Act is narrowly drawn, allowing attachment only in special "situation[s] requiring special protection to . . . creditor interests," *Sniadach* v. *Family Finance Corp.*,



395 U.S. 337, 339, 23 L.Ed.2d 349, 352, 89 S.Ct. 1820 (1969), and where prompt and summary action is required. *Fuentes* v. *Shevin*, 407 U.S. 67, 93, 32 L.Ed.2d 556, 577, 93 S.Ct. 1983 (1972); *Hutchinson* v. *Bank of North Carolina*, 392 F.Supp. 888, 895 (M.D. N.C. 1975). Under the Illinois Act, attachment may be had only in nine narrow circumstances (§1) (A. 28-29), all of which give the creditor grave concern for his ability to collect from the debtor, absent summary procedures. The first five grounds for attachment, which the district court's opinion does not directly reach,[4] concern situations where the debtor is absent from the State, cannot be served with process, or is about to remove himself and/or his property from the State. The other four grounds, with which the district court specifically dealt, concern situations where the debtor has or is about to fraudulently conceal or dispose of his property or has fraudulently contracted for the debt sued upon so as to hinder or delay his creditors. In such cases there can be little doubt that summary action is necessary. If the debtor were to be forewarned of the creditor's suit, the creditor's claim would quite likely become worthless.

In actions sounding in tort under the Illinois Act, the creditor must be examined by a judge concerning his cause of action before a writ of attachment may issue (§2) (A.

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4 The court's injunction refers only to attachment proceedings under section one, parts sixth through ninth. The court, however, declared §§1, 2, 2a, 6, 8, 10, and 14 of the Act unconstitutional, thus foreclosing attachments on any of the grounds set forth in section one.

29-30).[5] In contract actions, the matters involved are ordinarily substantiated by documentary proof and a sworn affidavit should thus be sufficient. *Mitchell,* 416 U.S. at 609, 40 L.Ed.2d at 415. In such cases an ex parte appearance before a judge would be a mere formality.

The debtor is also protected against all loss by the creditor's bond, except where a state agency is the creditor, as here (§§4a, 4b) (A. 31-32), and may recover damages and costs for wrongful attachment (§4a, 27) (A. 31-32, 44), which include attorney's fees. *Chase* v. *Bodge*, 194 Ill. App. 352 (1915). The debtor may also bring a tort action against the creditor for bringing the attachment without probable cause. In such cases the damages recoverable include all losses incurred as a result of the attachment, *Lawrence* v. *Hagerman,* 56 Ill. 68 (1870), *Baird* v. *Liepelt,* 62 Ill. App. 2d 154, 210 N.E.2d 1 (1965), and in cases of malice, exemplary damages. *Lawrence* v. *Hagerman,* 56 Ill. 68 (1870).

The debtor may recover possession of the property by filing a bond (§§14, 15) (A. 38). Destruction of the attached property is precluded because the sheriff retains custody of it (§14) (A. 38). This latter protection afforded a debtor was absent in *Mitchell* where the creditor took possession of the seized property. Thus, the deprivation of property in this case is far less serious, since destruction and waste

[5] The attachment action as filed in the state court in this case proceeded upon a contract theory (A. 18). Since the underlying claim is fraud, however, it seems apparent that appellee could have attempted an attack on the writ of attachment as being illegally issued, in that the claim sounds in tort, and thus, it was necessary for State to apply to a judge for the writ. Whether the State should have so proceeded in this case is a question peculiarly for state court to answer.



by the creditor are foreclosed. Possession by the sheriff ensures official supervision of the attachment proceeding, and thereby prevents the abuse of the attachment remedy.

Under the Illinois Act, the debtor is also given an early hearing within 60 days of the attachment, at which he may attack the attachment alone, or defend on the merits of the underlying claim (§§6, 25) (A. 33-34, 43).[6] Given the requirements of modern litigation, a hearing within 60 days must be considered timely. Furthermore, the debtor may well be able to advance the hearing date by filing a motion to quash or dismiss. Such advancements are discretionary with the court and should be granted for good and sufficient cause. *Page* v. *Dillon,* 61 Ill. App. 282 (1895). At any hearing on any of the issues involved, the burden is upon the creditor to prove strictly every fact that forms the basis of his attachment. *Apollo Metals, Inc.* v. *Standard Mirror Co.,* 87 Ill. App. 2d 383, 389, 231 N.E.2d 655, 659 (1967); *Jaycox* v. *Wing,* 66 Ill. 182 (1872). There are no presumptions in favor of an attachment plaintiff. *Weber Chimney Co.* v. *Johnson,* 205 Ill. App. 348 (1917).

While a creditor's lien is not involved in this case, as was in *Mitchell,* the Illinois Act is, as noted above, much more narrowly drawn, encompassing only nine circumstances, all of which give a creditor grave concern for his

[6] Appellees surveyed the attachment cases filed in Cook County, Illinois in 1974. Of the 97 cases initiated, they located 78 case files. The average period of time in these cases between the date on which the writ of attachment was served and the return date was 18.2 days, the longest period being 59 days. In the 13 cases in which the debtors appeared on the return day, the average period of time between the date the writ was served and the trial date was 39 days, the longest period being 70 days. In the present case, the period between service of the writ and the scheduled trial date was 42 days (A. 9-10).

ability to collect from the debtor. These nine circumstances are far more threatening than those that were involved in *Mitchell,* where the creditor had only to show that it was within the power of the debtor to conceal or waste the property in issue. Moreover, it cannot be said that a creditor's lien is at all necessary to the result in *Mitchell.* In *North Georgia Finishing, Inc.* v. *Di-Chem Inc.,* 419 U.S. 601, 42 L.Ed 2d 751, 95 S.Ct. 719 (1975), this Court, in reaffirming *Mitchell* and testing the facts of *North Georgia* against the requirements of *Mitchell,* did not specify the existence of a property interest in the creditor as a necessary requisite. 419 U.S. at 606-07, 42 L.Ed.2d at 757. *Hutchinson* v. *Bank of North Carolina,* 392 F.Supp. at 898. It should also be noted that the appellants do have an interest in the monies in appellees' credit union account, since the more than $3,700 in public aid which appellees collected and to which they were not entitled, undoubtedly enabled appellees to accumulate the money in that account.

In sum, the procedures provided for by the Illinois Attachment Act represent a constitutional accommodation between the interests of the parties. The impact on the debtor caused by the initial short period during which he is deprived of the use of the attached property is far outweighed by the serious risks to the creditor, absent attachment. The Act is narrowly drawn to encompass only those situations where there is a great likelihood that a creditor's claim against the debtor will become worthless if the debtor is forewarned of the attachment. The risk to the creditor also outweighs the possibility of mistaken attachment, which is held to a bare minimum by the safeguards built into the Illinois Act. The creditor must establish his claim against the debtor, as well as his entitlement to the attachment remedy, by specific facts sworn to in an affidavit. Where the claim sounds in tort, the creditor must appear before a



judge before a writ of attachment will issue. The sheriff retains possession of the attached property, thus foreclosing creditor abuse. The debtor is entitled to an early hearing on the attachment, and may also recover possession by filing a bond. The Act ensures that the losing party on the underlying claim is protected against all loss by requiring the creditor to post a bond. Without the attachment procedure, however, the risk of loss to the creditor would be very great in the context of the factual situations at which the Illinois Act is directed.

Finally, it should be emphasized that the Illinois Act, as applied in this case, must be viewed in light of the important governmental interest which has been served by the attachment. The Illinois Department of Public Aid brought the attachment suit against appellees as a part of its general effort to eliminate various forms of welfare fraud. Both state and federal law place the duty upon the Department to make such efforts. Ill. Rev. Stat. 1973, ch. 23, §11-21 (A. 26-27); 45 C.F.R. §235.110. In dealing with the type of welfare case at issue, there is a special need for prompt action because of the great likelihood that the recipient under investigation will take steps to hinder the inquiry by either removing the funds from their present location or leaving the jurisdiction. The State has a significant interest in the attached property, which cannot be sufficiently protected if a lapse of time were to ensue before seizure of the property. The State has exercised its statutory authority to investigate and correct fraudulent acts only after careful investigation, and is able to exercise this authority to attach property only where there is a very real danger of inability to collect the money to which it is entitled, absent attachment. This Court has consistently upheld summary procedures like those involved here where those procedures were employed to secure an im-

portant governmental interest. *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 6 L.Ed.2d 1230, 81 S.Ct. 1743 (1961); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 94 L.Ed. 1088, 70 S.Ct. 870 (1949); *Fahey* v. *Mallonee*, 332 U.S. 245, 91 L.Ed. 2030, 67 S.Ct. 1552 (1946); *Phillips* v. *Commissioner*, 283 U.S. 589, 75 L.Ed. 1289, 51 S.Ct. 608 (1930); *Coffin Bros. & Co.* v. *Bennett*, 277 U.S. 29, 72 L.Ed. 768, 48 S.Ct. 422 (1927); *Ownbey* v. *Morgan*, 256 U.S. 94, 65 L.Ed. 837, 41 S.Ct. 433 (1920); *see Fuentes* v. *Shevin*, 407 U.S. at 90-92, 32 L.Ed.2d at 575-77.

## CONCLUSION

For the foregoing reasons, appellants respectfully request that this Honorable Court vacate the judgment of the district court, because that court failed to defer to the Illinois state court for a resolution of the due process issue presented in a pending state attachment proceeding.

In the alternative, appellants request that the district court's judgment be reversed on the basis that the procedures prescribed by the Illinois Attachment Act comport with principles of due process.

Respectfully submitted,

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 75-1407**

JAMES TRAINOR, et al.,

*Appellees.*

vs.

JUAN HERNANDEZ, et al.,

*Appellants.*

**On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division**

## BRIEF FOR APPELLEES MORGAN M. FINLEY AND RICHARD J. ELROD IN SUPPORT OF APPELLANTS' POSITION

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**On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division**

## BRIEF FOR APPELLEES MORGAN M. FINLEY AND RICHARD J. ELROD IN SUPPORT OF APPELLANTS' POSITION

## OPINION BELOW

The opinion of the three judge panel for the Northern District of Illinois, Eastern Division, is reported at 405 F. Supp. 757 (N.D. Ill. 1975). The courts' judgment order and opinion are appended hereto in Appendix B.

## JURISDICTION

On December 2, 1974 the plaintiffs brought this 42 U.S.C. § 1983 class action seeking declaratory and injunctive relief from the Illinois Attachment Act. A three judge panel was convened pursuant to 28 U.S.C. §§ 2281 and 2284. The judgment of the Court was entered December 15, 1975 (App. A), granting the plaintiffs requested relief.

Appellees Morgan M. Finley and Richard J. Elrod filed their Notice of Appeal in the District Court on May 10, 1976. The Supreme Court of the United States has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1253.

## QUESTIONS PRESENTED

I. Whether the three judge district court should have abstained from hearing this case.

II. Whether the statutory procedures provided in the Illinois Attachment Act, Illinois Revised Statutes, 1973, Chapter 11, afford these plaintiffs due process of law.

## STATUTE INVOLVED

Chapter 11 of the Illinois Revised Statutes, 1973, also known as the Illinois Attachment Act, is reprinted herein as Appendix C.



## STATEMENT OF THE CASE

Plaintiffs filed this class action pursuant to 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1983. They sought declaratory and injunctive relief from the Illinois Attachment Act (reprinted at Appendix C). Originally, the State of Illinois, on the relation of the Illinois Department of Public Aid, initiated an attachment action in the Illinois courts against certain of the plaintiffs' funds held by a credit union. The basis of the action was that the named plaintiffs had fraudulently procured public assistance in that they had failed to disclose the existence of these funds to the State when application for assistance was made. The State suit was brought pursuant to section 11-21 of the Illinois Public Aid Code (Ill. Rev. Stat. 1973, ch. 23, § 11-21, reprinted herein as Appendix D). This statutory section allows the filing of either civil or criminal actions against a person who fraudulently conceals any facts which affect his entitlement to public assistance.

The Department of Public Aid alleged by way of affidavit in its attachment suit that these plaintiffs had received $3,720.20 to which they were not entitled. Pursuant to the Illinois Attachment Act, the State may receive a writ of attachment after it files its claim if it has alleged one of nine circumstances which the act specifies as grounds for an attachment. All attachment claimants, except state agencies, are required to post a bond twice the value of the claim or property (see § 4a, 4b in Appendix C).

The claim, supported by affidavit, and the bond is filed with the Clerk of the Court, that is, appellee Morgan M. Finley, who issues the writ of attachment. The writ is directed to the Sheriff, who executes thereon. The attachment defendant must appear and plead not less than ten nor more than sixty days from the date of the writ. (§§ 6,

25). The attachment plaintiff must file his complaint at least ten days before the return date. The defendant has the option to file any responsive pleading to the complaint (§ 26, 27). The burden of proof of the claim is on the plaintiff, who is also liable to damages and costs for wrongfully filed claims (§§ 4a, 27). The defendant need not relinquish control of the property if he posts a bond twice the value of property or debt (§ 14, 15). The Sheriff maintains custody of property pending disposition (§ 14) and the garnishee maintains control of funds (§ 21).

Plaintiffs at bar sought no relief from the writ of attachment in the State Court proceedings but instead brought this suit. The State Court suit is unresolved pending final disposition of this case. The gist of plaintiffs' claim is that they were denied due process of law in that the writ may issue without judicial scrutiny and without prior notice or an opportunity to be heard. The three judge court certified both plaintiff and defendant classes. Plaintiffs' motion for a temporary restraining order was denied after the State agreed to release one half of the attached funds. The defendants moved to dismiss the complaint and the plaintiffs moved for summary judgment. Declaratory and injunctive relief was granted to the plaintiffs and the defendants' motions for a stay in the injunction was denied, Circuit Judge Pell dissenting.



## SUMMARY OF ARGUMENT

### I.

All defendants urged the District Court to abstain from hearing the federal suit on its merits. Briefs were filed urging the applicability of *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), which case was decided by this court during the District Court's consideration of the defendants' motions to dismiss and the plaintiffs' motion for summary judgment. These defendants believe that *Huffman* is directly applicable to these proceedings and that the District Court should properly have abstained from hearing these plaintiffs' claims.

### II.

These defendants defer to the appellants to make argument concerning the constitutionality of the statute in question. These defendants specifically adopt appellants' argument on this issue and incorporate it herein as their own.

## ARGUMENT

### I.

### THE THREE JUDGE DISTRICT COURT SHOULD HAVE ABSTAINED FROM HEARING THIS CASE ON THE MERITS.

For reasons which can readily be identified, all governmental authorities are inherently officious. Their nature causes them to seek out the boundaries of their authority. Statutory proscription is generally vague and legislative guidance is meager. Agencies are under constant pressure to become involved in matters which are increasingly removed from their stated purpose. Governmental authorities take on national characteristics. Spheres of influence are created and quickly challenged. Power vacuums exist only briefly. Ubiquitous federal interference with state and local authorities has generated a new national political issue. While such intermeddling is well intentioned, it is no less obnoxious to the local authority seeking to enforce federal constitutional rights. The presumption by federal authorities that they can better deal with any given problem is totally repugnant to the local official. It is against this background that the present case comes before the Court. This court is called upon to act as a buffer between the federal and state court systems. For this purpose the Supreme Court acts not as a superior federal court, but as an arbiter between the two systems.

Judicial abstention postpones or altogether avoids the determination of an issue of law when that issue would more appropriately be made by another court or agency. There are a number of reasons for applying abstention, but the underlying reason is usually that a state court should not be precluded from having the first opportunity to review constitutional attacks on its own laws or procedures.



This court recognized the problem long before it became an issue of eager candidates for office. In 1941 *Railroad Comm'n* v. *Pullman,* 312 U.S. 496, the first step was taken. It was deemed prudent to allow state courts to first rule on issues concerning state law as such determination could well moot or otherwise eliminate the federal claim. The *Pullman* decision recognized the delicate (and not always harmonious) relationship between state and federal governments and the need to avoid unnecessary friction between the two. Originally, abstention was utilized usually in those cases where friction was actually a present problem. Thirty-five years later it has evolved into a doctrine by which courts should refuse to exercise jurisdiction in any case which could properly be heard by a state tribunal, absent certain special exceptions. The District Court for the Northern District of Illinois, Eastern Division should have abstained in the case at bar.

Recent holdings by this court leave little doubt that abstention has come a long way from *Pullman.* This court, if not the lower federal courts, has specifically found the state courts fully competent to rule on federal constitutional claims. Resort to the federal forum, we are admonished, should be the last resort, not the first. A developing line of cases in which this court has applied judicial abstention is exemplified by *Younger* v. *Harris,* 401 U.S. 37, 91 S. Ct. 746 (1971) and *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 95 S. Ct. 1200 (1975). While *Younger* applied abstention to pending state criminal proceedings, *Huffman* extended the doctrine to include civil litigation – at least that which is cloaked with quasi-criminal characteristics.

In *Huffman,* an Ohio movie theater was ordered closed pursuant to an Ohio nuisance statute. The theater owner filed suit in the federal district court rather than appeal the state decision to the state appellate courts. A three-

judge panel enjoined the execution of the state court judgment. In the case at bar, a state court proceeding was in progress in which all of the claims raised by the plaintiffs here could have been fully litigated. Mr. Justice Rehnquist, writing for the majority, pointedly stated,

> "A civil litigant may, of course, seek review of any federal claim properly asserted in and rejected by the state courts. Moreover, where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this court lies as a matter of right."
> [95 S. Ct. at 1209]

The theater owners were challenging the state court action on the grounds that they were being denied property without due process of law. The similarity between the claims made in *Huffman* and the case at bar is striking. *Huffman* held,

> "Appellee's argument . . . apparently depends on the unarticulated major premise that every litigant who asserts a federal claim is entitled to have it decided on the merits by a federal, rather than a state, court. We need not consider the validity of this premise in order to reject the result which appellee seeks. Even assuming, *arguendo,* that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings." [95 S. Ct. at 1209]

The Court noted that federal court preemption of constitutional claims "can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles.' " [Supra at 1208, citing *Steffel* v. *Thomson,* 415 U.S. 452 at 462]. Moreover, there should be no "assumption that state court judges will not be faithful to their constitutional responsibilities." [supra at 1211]. Permitting the lower federal courts to interject themselves, at will, into the determinations of state law will inevitably lead to the erosion and eventual demise of the autonomy, integrity, and credibility of the state court system.



It is now clear that a state court proceeding is not to be considered con[illegible]eted until after available appellate remedies have been exhausted. In the case at bar the plaintiffs initiated the federal proceeding before the state court had an opportunity to conduct its initial hearing. The propriety in affording the state court the opportunity it deserves to resolve federal issues rests upon the well established principle of comity and federalism. While the District Court did not make clear its reasons for believing these principles did not apply, it is fair to assume that it felt justified in reaching the merits of the case because "on its face the Illinois Attachment Act does not meet the due process standards." [App. B9]. Interestingly enough, the District Court in *Younger* v. *Harris,* 401 U.S. 37, 91 S. Ct. 746 (1971), struck down a statute because of its facial invalidity. This court in reversing that decision, held unequivocally that facial constitutional defects in a statute are not, in themselves, an exceptional circumstance to justify interfering with the state proceedings. This court concluded in *Huffman* that, as in the *Younger* holdings, there are two exceptions to the doctrine of abstention. If the state proceeding is conducted in bad faith or if the challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it," [*Huffman, supra,* at 1212] then the federal district court need not abstain. These defendants need only observe that the Dis-

trict Court in the case at bar found neither bad faith nor flagrant infirmity in every aspect as required by *Younger* and reaffirmed by *Huffman*. Absent such a special finding, it was error for the District Court to reach the merits. It should be made clear that *Huffman* was decided by this court *prior* to the District Court's decision and *Huffman* was fully briefed.

Assuming, arguendo, that *Huffman* is applicable only when a quasi-criminal statute is at issue in the state courts, it is clear that the underlying basis for the proceeding under the Illinois Attachment Act was quasi-criminal, e.g.: fraud, (Ch. 23, § 11-21, *Ill. Rev. Stat.*). The Ohio nuisance statute clearly gave a civil remedy for a criminal act (the showing of obscene films) and is perfectly analogous to this statute in which a civil remedy is given for a criminal act (arguably these plaintiffs could be prosecuted for felony theft in Illinois, see Ch. 38, § 16-1(b) and (e)(2), *Ill. Rev. Stat.*). Both Ohio's nuisance statute and Illinois' Attachment Act are quasi-criminal in that they both may be used in aid of state criminal laws. The District Court found it to be "mere happenstance" [App. B. 5] that the State of Illinois was the petitioner in the state proceedings. It further found it to be highly "coincidental" that the state proceeding could arguably be quasi-criminal in nature. Having made those observations, the court then proceeded to disregard the consequence of those concurrences, that is, the impact that federal interference would have upon comity and federalism considerations vis-a-vis the state action.

Another consideration is that even if this court were to believe that an adequate exception to abstention exists, the District Court erred in entering the injunction. *Fenner* v. *Boykin,* 271 U.S. 240, 46 S. Ct. 492 (1926), and as reaffirmed in *Younger,* required that extraordinary cir-



cumstances must be present to justify federal injunctive relief. The "irreparable injury" necessary for any injunction was deemed not a sufficient reason for granting injunctive relief. Rather, the irreparable injury must be "great and immediate." Plaintiffs have failed to adequately explain how irreparable injury which is great and immediate is present in this case. Plaintiffs were charged with having fraudulently received nearly $4,000.00 in financial assistance. The state had attached $600.00 in plaintiffs' savings account which sum was reduced to $300.00 at the time the District Court entered its decision in this case. It is assumed by plaintiffs that having a sum of money involved in litigation for forty-four days meets the rigorous injury requirements even though costs and damages could be assessed against the state if the claim proved baseless. Plaintiffs could also have moved for an early hearing in order to present any defenses on the merits they might have had but declined to do so.

In addition to *Huffman* and *Younger,* this court has expanded the applicability of abstention to factually different but nevertheless analogous situations.

In *Rizzo* v. *Goode,* 96 S. Ct. 598 (1976), suit was brought in the U.S. District Court for the Eastern Division of Pennsylvania alleging unconstitutional mistreatment of minority citizens. The District Court directed the petitioners to draft a system, for the court's approval, dealing with citizens' complaints of police misconduct, including detailed suggestions for revising police manuals and procedural rules dealing with citizens and complaints. The draft was later incorporated into the court's final judgment. The appellate court affirmed this exercise of equitable relief.

Petitioners to the Supreme Court, who were the Mayor of Philadelphia, the City Managing Director, and the Police Commissioner, claimed that the District Court had caused an unwarranted intrusion into the discretionary authority to perform their duties, which was committed to them by State and local law.

This Court reversed, noting "the special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own laws" [96 S. Ct. at 607]. Further, in adding that the principles of federalism apply not only when seeking to enjoin a state criminal proceeding, this Court interpreted *Huffman,* by holding that "the same principles of federalism may prevent the injunction by a federal court of a state civil proceeding once begun." [*supra,* at 608]. Hence, *Rizzo* stands for the proposition that the independence of state functions and procedures is to be safeguarded, whether these functions and procedures are criminal or civil in nature.

On July 6, 1976, this Court decided the cases of *Stone* v. *Powell* and *Wolff* v. *Rice* (44 L.W. 5313 and 5317), cases which again demonstrate a tendency to avoid encroachment on the state courts. Inmates Powell and Rice brought federal habeas corpus actions alleging that use of illegally seized evidence led to their convictions in state courts. This Court held that,

> "... Where a state has provided an opportunity for full and fair litigation of a 4th amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."

Similarly, in the case at bar the State Court action provided an opportunity for full and fair litigation of the due process claim. *Carey* v. *Sugar,* 96 S. Ct. 1208 (1976), also



expresses this court's view about the current role of abstention.

As in *Powell* and *Rice, Rizzo, Younger* and *Huffman,* the better course of action for the District Court in this case was to abstain from proceeding on the merits. Abstention accords integrity to the state court system, a system operating parallel to the federal courts and one which is fully competent, and obligated by the United States Constitution, to decide issues of federal constitutional law.

## II.

## THE STATUTORY PROCEDURES PROVIDED IN THE ILLINOIS ATTACHMENT ACT, ILLINOIS REVISED STATUTES, 1973, CHAPTER 11 AFFORD THESE PLAINTIFFS DUE PROCESS OF LAW.

These defendants defer to the appellants to make argument concerning the constitutionality of the statute in question. These defendants specifically adopt appellants' argument on this issue and incorporate it herein as their own.

## CONCLUSION

For the foregoing reasons, it is submitted by these defendants that the decision of the District Court should be reversed.

Respectfully submitted,

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## APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

*Plaintiffs,*

v.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Acting Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Departmnet of Public Aid,

*Defendants.*

No. 74 C 3473

### ORDER

In accordance with this Court's memorandum opinion, the Court enters judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure as follows:

1. Illinois Revised Statutes, Chapter 11, Sections 1, 2, 2a, 6, 8, 10 and 14 are on their face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Defendants Finley and Elrod are ordered to cause release of all property of plaintiffs Juan and Maria Hernandez attached pursuant to writ of attachment.

3. Defendant Finley and all other clerks for the judicial circuits of Illinois, their successors, agents and employees are hereby enjoined from issuing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, § 1, subsections sixth through ninth.

4. Defendant Elrod and all other county sheriffs of the State of Illinois, their successors, agents and employees are hereby enjoined from executing writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, § 1, subsections sixth through ninth.

5. Defendants Trainor and O'Malley are hereby enjoined from authorizing and processing applications for writs of attachment pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, § 1, subsections sixth through ninth.

6. Defendants Finley and Elrod, all other clerks of the judicial circuits of Illinois, and all other county sheriffs of Illinois, are ordered to cause release of any property currently attached pursuant to the Illinois Attachment Act, Illinois Revised Statutes, Ch. 11, § 1, subsections sixth through ninth, and give notice of such release to all persons whose property is the object of such attachments.



7. The question of plaintiffs' entitlement to money damages is remanded for determination to Judge Kirkland, the Judge to whom this case was originally assigned.

ENTER:

WILBUR F. PELL, JR.,
U. S. Circuit Court Judge

JOEL M. FLAUM,
U. S. District Court Judge

ALFRED Y. KIRKLAND,
U. S. District Court Judge

DATED: December 15, 1975

## APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

*Plaintiffs,*

v.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, RICHARD J. ELROD, Sheriff of Cook County, individually and in his official capacity and on behalf of all other persons similarly situated, JAMES TRAINOR, Acting Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

*Defendants.*

No. 74 C 3473

Before PELL, Circuit Judge, FLAUM and KIRKLAND, District Judges.

KIRKLAND, District Judge. This matter comes before the Court on motion of defendants to dismiss the complaint for failure to state a claim upon which relief could be

granted. Plaintiffs have cross-filed for summary judgment on entitlement to declaratory and injunctive relief. Further, on instruction by the Court, the parties briefed the issue of whether, in light of *Huffman* v. *Pursue, Ltd.*, ——U.S. ——, 95 S. Ct. 1200 (1975), this Court should enjoin a pending state attachment proceeding against plaintiffs prior to exhaustion of state judicial remedies.

The Illinois Department of Public Aid ("IDPA") filed suit in Circuit Court of Cook County, Illinois, on October 30, 1974, alleging that plaintiffs had fraudulently concealed the existence of monies while applying for and receiving public aid assistance. Simultaneous with filing of this suit, IDPA filed an attachment complaint which resulted in attachment of plaintiffs' funds in a credit union on November 5, 1974. After answering the complaint and filing their appearance, plaintiffs filed the instant complaint in federal court challenging the constitutionality of the Illinois Attachment Act and seeking declaratory, injunctive and other relief.

Jurisdiction is alleged under 28 U.S.C § 1343 (3) and (4) and 42 U.S.C. § 1983. The complaint challenges the constitutionality of the Illinois Attachment Act, Ch. 11, §§ 1, 2, 2a, 6, 8, 10 and 14. The Act is alleged to be unconstitutional both on its face and as applied on grounds that it violates the due process clause of the Fourteenth Amendment to the United States Constitution.

Two issues are presented to this Court for decision: (1) does *Huffman* v. *Pursue, Ltd., supra*, prevent this Court from intervening in a state civil proceeding filed pursuant to a state statute alleged to be unconstitutional; and (2) if the preceding question is answered in the negative, are the challenged portions of the Illinois Attachment Act unconstitutional?



## I. MUST FEDERAL ACTION BE RESTRAINED PENDING EXHAUSTION OF STATE REMEDIES?

The Supreme Court in *Huffman* extended for the first time the doctrine of non-interference with state criminal proceedings, articulated in *Younger* v. *Harris*, 401 U.S. 37 (1971), to a civil proceeding. The remedy presently sought by plaintiffs would require this Court to enjoin a state court civil proceeding; hence we are constrained at the outset to examine the applicability of *Huffman* prior to any consideration of the merits of this case.

The only obstacle to reaching the merits of this case would be a determination that the principles articulated in *Huffman* apply here.

It is clear that this Court is empowered to enjoin state action under certain circumstances, notwithstanding the general prohibtion against such injunctions found in 28 U.S.C. § 2283. *Mitchum* v. *Foster*, 407 U.S. 225 (1972), held that the anti-injunction rule of Section 2283 does not apply to civil rights actions under 42 U.S.C. § 1983. Likewise, if the Illinois attachment proceeding were determined not to be "proceedings in a state court", the anti-injunction statute by its own terms would not apply. This Court holds the challenged attachment proceeding to be a pending proceeding within the meaning of Section 2283.

The *Huffman* case arose out of an attempt by the State of Ohio to close a theater which showed allegedly obscene films, on grounds that the theater was creating a public nuisance. The State proceeded under the Ohio nuisance statute, which defined a place exhibiting obscene films as a nuisance. The Ohio Court determined in an adversary proceeding that the films were obscene and immediately

ordered that the theater be closed. Following this decision, and without exhausting state appellate procedure, the theater operator filed suit in federal court. A three-judge district court held that closing of the theater by the Ohio State Court was violative of the plaintiff operator's constitutional rights because the films had not been declared obscene prior to their exhibition. The plaintiff operator had not exhibited any films after the determination that said films were obscene.

The Supreme Court vacated the order of the three-judge court on grounds of equity, comity and federalism, holding that the principles of *Younger* v. *Harris, supra,* were applicable even though the state proceeding was civil in nature.

The *Younger* decision gave approval to long-standing policy that federal courts should not interfere with state criminal proceedings except in extraordinary circumstances. See *Fenner* v. *Boykin,* 271 U.S. 240 (1926); *Spielman Motor Sales Co.* v. *Dodge,* 295 U.S. 89 (1935); *Stefanelli* v. *Minard,* 342 U.S. 117 (1951). *Younger* specifically held that federal injunctive relief should not be employed against state criminal prosecutions except: (1) upon a showing of "irreparable injury" that is both "great and immediate"; or (2) where the statute in question is "flagrantly and patently violative of express constitutional prohibitions". 401 U.S. at 53.

The decision in *Huffman* is significant in that it represents the first extension of these principles to non-criminal proceedings. In extending this doctrine, the Court stated that action of the State of Ohio was more akin to criminal proceedings than most civil cases. 95 S. Ct. 1208. This Court is of the opinion, however, that *Huffman* v. *Pursue, Ltd.,* is not applicable here for two reasons.



First, the rule of *Younger* was established for, and has been limited in application to, criminal proceedings. The Court's principal justification for extension of the *Younger* doctrine in *Huffman* was that Ohio's civil proceeding was "in aid of and closely related to criminal statutes". 95 S. Ct. 1208. In *Huffman,* the State of Ohio proceeded under a statute which gave an exclusive right of action to the state. By contrast, the Illinois Attachment Act provides a cause of action for any person, public or private. It is mere happenstance that the State of Illinois was the petitioner in this attachment proceeding. It is likewise coincidental that the pending state proceedings may arguably be quasi-criminal in nature; under the Illinois Attachment Act, they need not be. These major distinctions preclude this Court from extending the principles of *Younger,* based on considerations of equity, comity and federalism, beyond the quasi-criminal situation set forth in *Huffman.*

Second, an express exception to the *Younger* rule of non-interference in state criminal proceedings exists where the challenged statute is patently and flagrantly violative of the Constitution. This Court is of the opinion that the present case falls within that exception, for reasons hereinafter set forth.

## II. IS THE ILLINOIS ATTACHMENT ACT UNCONSTITUTIONAL?

Four recent Supreme Court cases are controlling authority in an analysis of constitutional validity of summary creditor remedies. These cases include *Sniadach* v. *Family Finance Corp.,* 397 U.S. 254 (1969), *Fuentes* v. *Shevin,* 407 U.S. 67 (1972); *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600 (1974); and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* ——U.S.——, 42 L. Ed. 753 (1975).

In *Sniadach* v. *Family Finance Corp., supra,* the Court held that a Wisconsin pre-judgment garnishment procedure which resulted in garnishment of wages without notice and prior hearing, violated fundamental principles of due process.

In *Fuentes* v. *Shevin, supra,* the Supreme Court examined the replevin acts of Florida and Pennsylvania. Both acts authorized the issuance of pre-judgment writs of replevin through a summary process of *ex parte* application to the court clerk, accompanied by the posting of bond for an amount in excess of the property's value. Neither act provided for notice and prior hearing or an immediate post-seizure hearing. Both acts did permit the respondent to recover his replevied property upon posting of a bond in double the amount of its value. The Court held that procedural due process required that a person in possession of chattels be given an opportunity for a hearing prior to issuance of a writ of replevin. The Court further held that posting of a bond was a minimal deterrent to abusive or even good faith use of the replevin procedure and constituted no substitute for a pre-seizure hearing.

In *Mitchell* v. *W. T. Grant Co., supra,* the Supreme Court carved out an exception to the pre-seizure hearing rule promulgated in *Sniadach* and *Fuentes.* There the Court upheld the validity of a Louisiana sequestration act which authorized sequestration of encumbered property upon *ex parte* application of a creditor without notice to the debtor or opportunity for prior hearing. The Court found, however, that the Louisiana act did provide safeguards not present in those statutes analyzed in *Sniadach* and *Fuentes.*

First, the Louisiana act required the creditor to file an affidavit before a judge, setting forth factual rather than



conclusory allegations which entitled the creditor to relief. A writ would only issue by the judge upon the proper showing. Second, and of equal importance, the act expressly entitled the debtor to an immediate post-seizure hearing; a hearing in which the burden was upon the creditor to prove the allegations contained in the affidavit. The Court found that these provisions sufficiently safeguarded the rights of the debtor to eliminate necessity for prior notice and hearing.

A Georgia garnishment act was examined by the Court in *North Georgia Finishing, Inc.* v. *DiChem, supra.* The Court determined that Georgia's summary procedure for garnishment satisfied neither the *Sniadach* and *Fuentes* requirement of pre-seizure hearing, nor the alternative judicial safeguards approved in *Mitchell.*

Having briefly summarized the applicable law, the Court now turns to the Illinois statute under constitutional challenge.

The Illinois Attachment Act (Illinois Revised Statutes, Ch. 11, 1973) authorizes a creditor with a money claim, whether liquidated or unliquidated and whether sounding in contract or tort, to attach the assets of an alleged debtor pending outcome of a lawsuit against the debtor on the money claim. The creditor can obtain a writ of attachment prior to filing his complaint against the debtor[1] and prior to the debtor having received notice of impending attachment or an opportunity to be heard on the question of whether the writ should issue.

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1. Pursuant to § 25 of the Act, the complaint must be filed at least ten days before the return date of the writ of attachment.

Section 1 of the Act provides for attachment in any of nine circumstances. Plaintiffs specifically attack four subsections which authorize attachment upon the creditor's allegations of debtor fraud:

> SIXTH: Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.
>
> SEVENTH: Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.[2]
>
> EIGHTH: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.
>
> NINTH: Where the debt sued for was fraudulently contracted on the part of the debtor. . . .
>
> Ill. Rev. Stat., Ch. 11, § 1, sixth through ninth.

A creditor will be entitled to a writ of attachment, against an alleged debtor's property, upon the filing of an affidavit by the creditor, or his agent or attorney, which sets forth in verbatim statutory language one of the above allegations, along with the nature and amount of the claim and the name and place of residence of the debtor. Upon filing of this affidavit and the required bond with the clerk of the circuit court, the clerk issues a writ of attachment directing the sheriff to serve it upon the debtor, or another person holding the debtor's property.

If the action sounds in tort, under Section 2 of the Act the creditor must apply to a judge of the circuit court.

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2. This is the sole allegation of fraud set forth in the affidavit of Defendant O'Malley upon which the writ of attachment was issued.



The judge, after questioning the creditor concerning the cause of action, endorses upon the affidavit the amount of damages for which the writ shall issue. Upon service of the writ, the sheriff takes and retains custody of the property attached or directs a third party in possession to withhold the attached property from the debtor.

The debtor may obtain release of his property prior to trial on the merits of the creditor's claim in two ways. First, the debtor can file a bond in double the value of the property attached, upon the condition that said property will be available for execution should judgment be rendered against him. Alternatively, he can file a bond in a sum sufficient to cover the amount of debt or damages alleged plus costs of suit.

Second, Section 27 of the Act provides that defendant debtor may answer by affidavit, denying the allegations set forth in the creditor's attachment affidavit; and if the court finds for defendant after trial on the merits of the attachment, the writ will be quashed. This section, however, does not give defendant an absolute right to a hearing on the attachment issue immediately after seizure.

The debtor whose property has been attached is thereby deprived of the use of his property from the date the writ is served until an uncertain future time when he receives a hearing on the attachment issue. Even if the debtor should seek a separate hearing thereon on the return date, the debtor can be deprived of his property for a period of sixty days, since Section 6 of the Act provides that the creditor shall set the return date from ten to sixty days after date of the writ.

It is clear on its face that the Illinois Attachment Act does not meet the due process standards established by the Supreme Court in the cases previously discussed.

The Illinois Act does not provide for pre-seizure hearing as required by *Fuentes*. Because of *Mitchell* v. *W. T. Grant Co., supra,* however, this Court does not hold that pre-seizure hearing is any longer an absolute requirement. However, neither does the Act provide the alternative safeguards approved by *Mitchell*. Specifically, the Illinois Act does not require the attachment creditor to set out facts in his affidavit which would entitle him to relief. The Act does not require the complainant to present such affidavit to a judge for determination of whether a writ should issue. Instead, the Act provides that upon conclusory allegatiosn in verbatim statutory language, coupled with certain procedural information, a writ will automatically issue from the clerk of the court.

The provision for judicial review in tort cases is limited only to the question of potential damages and determination of limit on the amount of property to be attached. The judge is not required to evaluate the legal sufficiency of sworn facts as was the case in *Mitchell*.

Neither does the Act provide for an *immediate* post-seizure hearing upon application of the debtor, a hearing in which the attachment creditor bears the burden of proving his entitlement to relief at risk of dissolution of the writ. The Illinois Act merely provides for a post-seizure hearing on application by the debtor at a time to be set at the convenience of the Court. The Court, therefore, is under no duty to set an immediate hearing.

For these reasons, this Court holds that the Illinois Attachment Act is on its face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

Plaintiffs are entitled to injunctive relief against defendants. Separate order to issue in accordance with this opinion.

Dated: December 15, 1975



## APPENDIX C

### THE ILLINOIS ATTACHMENT ACT, ILLINOIS REVISED STATUTES 1973,

### CHAPTER 11.

1. Causes.] § 1. In any court having competent jurisdiction, a creditor having a money claim, whether liquidated or unliquidated, and whether sounding in contract or tort, may have an attachment against the property of his debtor, or that of any one or more of several debtors, either at the time of instituting suit or thereafter, when the claim exceeds $20, in any one of the following cases:

First: Where the debtor is not a resident of this State.

Second: When the debtor conceals himself or stands in defiance of an officer, so that process cannot be served upon him.

Third: Where the debtor has departed from this State with the intention of having his effects removed from this State.

Fourth: Where the debtor is about to depart from this State with the intention of having his effects removed from this State.

Fifth: Where the debtor is about to remove his property from this State to the injury of such creditor.

Sixth: Where the debtor has within 2 years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.

Seventh: Where the debtor has, within 2 years prior to the filing of such affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.

Eighth: Where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.

Ninth: Where the debt sued for was fraudulently contracted on the part of the debtor: Provided, the statements of the debtor, his agent or attorney, which constitute the fraud, shall have been reduced to writing, and his signature attached thereto, by himself, agent or attorney.

1a. Venue.] § 1a. The venue provisions applicable to other civil cases shall apply to attachment proceedings; and in addition thereto, attachment proceedings may be brought in the County where property or credits of the debtor are found.

2. Affidavit — Statement — Examination under oath.] § 2. To entitle a creditor to such a writ of attachment, he or his agent or attorney shall make and file with the clerk of the circuit court, an affidavit setting forth the nature and amount of the claim, so far as practicable, after allowing all just credits and set-offs, and any one or more of the causes mentioned in section 1, and also stating the place of residence of the defendants, if known, and if not known, that upon diligent inquiry the affiant has not been able to ascertain the same together with a written statement, either embodied in such affidavit or separately in writing, executed by the attorney or attorneys representing the creditor, to the effect that the attachment action invoked by such affidavit does or does not sound in tort, also a designation of the return day for the summons to be issued in said action. In all actions sounding in tort, before the writ of attachment shall be issued, the plaintiff, his agent or attorney, shall apply to a judge of the circuit court of the county in which the suit is to be brought or is pending and be examined,



under oath, by such judge concerning the cause of action; and, thereupon, such judge shall indorse upon the affidavit the amount of damages for which the writ shall issue, and no greater amount shall be claimed.

2a. Form of affidavit.] § 2a. Affidavits for attachment before courts may be substantially in the following form:

STATE OF ILLINOIS, )
) ss.
..... County )

A B, being duly sworn, says: That (here state if affiant is agent or attorney of the creditor; if suit is by an individual or corporation, the name of such individual or corporation, and if the suit is by a firm, the name of the partners) has a just demand against (name of debtor), on account of (here make short statement of the nature and amount of the claim), and the affiant believes (the name of the creditor) is entitled to recover of said (name of debtor), after allowing all just credits and setoffs ..... ..... dollars and ..... cents, which is now due, and that he has good reason to believe and does believe that (name of debtor) (here state the residence of the debtor if known, or if not, that the affiant has made diligent inquiry and cannot ascertain his place of residence.)

.....

Subscribed and sworn to before me on this ..... day of ....., ....., A.D.

.....

My commission expires ....., ....., A.D.

(If action sounds in tort here include the endorsement

of judge as to amount of damages for which writ shall issue.)

3. Names, etc., heirs, etc.] § 3. [Omitted]

4. § 4 Repealed]

4a. Bond — State and its departments and officers exempt.] § 4a. Before granting an attachment, as aforesaid, the clerk shall take bond and sufficient security, payable to the People of the State of Illinois, for the use of the person or persons interested in the property attached, in double the sum sworn to be due, conditioned for satisfying all costs which may be awarded to such defendant, or to any others interested in said proceedings, and all damages and costs which shall be recovered against the plaintiff, for wrongfully suing out such attachment — which bond, with affidavit of the party complaining, or his agent or attorney, shall be filed in the office of the clerk granting the attachment. Every attachment issued without a bond and affidavit taken, is hereby declared illegal and void, and shall be dismissed: Provided, however, that nothing herein contained shall be construed to require the State of Illinois, or any Department of Government thereof, or any State officer, to file a bond as plaintiff in any proceeding instituted under this Act.[1]

4b. Court may fix bond in double value of property to be attached.] § 4b. The court, or a judge thereof, upon ex parte motion, without notice, supported by affidavit of the plaintiff, his agent or attorney, substantially describing the property to be attached, and the value thereof, may, if satisfied of the bona fides of the application and sufficiency of the bond under the circumstances of the case,

1. Section 1 et seq. of this chapter.



including proposed garnishments, fix the amount of the bond in double the value of the property to be attached, instead of double the sum sworn to be due, and in such event the writ shall direct the officer to attach said specifically described property, but the value of said property to be attached shall not be in excess of an amount sufficient to satisfy the debt claimed and costs. The court may require that said affidavit be supplemented by additional showing, by appraisal or otherwise, as to the value of said property, and may, upon motion of any party to the action claiming an interest in said property, either before or after actual attachment, require additional security, or order release of the attachment to the extent not covered by adequate double security.

5. Condition of bond.] § 5. The condition of the bond required in the preceding section[1] shall be applicable to alias and pluries writs as well as original writs and shall be substantially in the following form:

The condition of this obligation is such, that, whereas the above bounden ..... hath, on the day of the date hereof, prayed an attachment out of the ..... Court of said County, at the suit of ..... against the estate of the above named ..... Now, if the said ..... shall prosecute his suit with effect, or in the case of failure therein shall well and truly satisfy all costs which may be awarded to said ..... or to any person or persons interested in the property attached, and all damages and costs which shall be recovered against the plaintiff for wrongfully suing out the said writ of attachment, or alias or pluries

1. "Preceding section" now repealed. But see section 4a, ante.

writ or writs of attachment, then the above obligation to be void; otherwise to remain in full force and effect.

Additional bonds shall not be required for the issuance of alias and pluries writs, except as provided in Section 10a[2] of this Act.

6. Writ – Form.] § 6. The writ of attachment required in the preceding section shall be directed to the sheriff (and, for purpose only of service of summons, to any person authorized to serve writs of summons), or in case the sheriff is interested, or otherwise disqualified or prevented from acting, to the coroner of the county in which the suit is commenced, and shall be made returnable on a return day designated by the plaintiff, which day shall not be less than ten days or more than sixty days after its date. Such writ shall be substantially in the following form:

The People of the State of Illinois to the Sheriff of ..... County: or for the purpose only of service as summons; to any person authorized to serve writs of summons: – Greeting:

Whereas A B (or agent or attorney of A B, as the case may be), hath complained that C D is justly indebted to the said A B to the amount of ..... and that (here state the cause set out in the affidavit) and the said ..... having given bond and security, according to law: We therefore command you that you attach so much of the estate, real or personal, of the said C D, to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the affidavit, but in case any specific property of the said C D, found in your county shall be described in this writ, then you

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2. Section 10a of this chapter.



shall attach said described property only, and no other property, the said specified property to be so attached, being described as follows:

.....

.....

and such estate so attached in your hands to secure, or so to provide, that the same may be liable to further proceedings thereupon, according to law; and that you summon C D to appear and answer the complaint of said A B, before the ..... Court of ..... at ..... in the county of ..... on the ..... day of ..... next; and that you also summon ..... and such other persons as you shall be required by the said A B, as garnishees, to be and appear before the said court on the said ..... day of ..... next, then and there to answer to what may be objected against them. When and where you shall make known to the said court how you have executed this writ, and have you then and there this writ.

Witness ..... clerk of the said court, this ..... day of ..... in the year of our Lord, etc.

Which writ of attachment shall be signed by the clerk, and the seal of the court shall be affixed thereto.

7. Attachment against a joint debtor.] § 7. In all cases where two or more persons are jointly indebted, either as partners or otherwise, and an affidavit shall be filed as provided in the first section of this act, so as to bring one or more of such joint debtors within its provisions, and amenable to the process of attachment, then the writ of attachment shall issue against the property and the effects of such as are so brought within the provisions of this act; and the officer shall be also directed in said writ to summon, all defendants to the action, whether the at-

tachment is against them or not, to answer to the said action, as in other cases of joint defendants.

8. Execution of writ.] § 8. Such officer shall without delay execute such writ of attachment upon the property described in the writ, or in the absence of such description, upon the lands, tenements, goods, chattels, rights, credits, moneys and effect of the debtor, or upon any lands and tenements in and to which such debtor has or may claim any equitable interest or title, of sufficient value to satisfy the claim sworn to, with costs of suit as commanded in such writ.

Except as provided in Section 11[1] of this act, the writ of attachment may be levied only in the county to which the writ is issued, and by a proper officer of said county.

9. Certificate of levy – Effect.]. § 9. [Omitted]

10. Serving defendant – Return.] § 10. The officer shall also serve said writ upon the defendant therein, if he can be found, in like manner as provided for service of summons in other civil cases. The return of such writ shall state the particular manner in which the same was served. If the writ is served upon the defendant less than ten days before the return day thereof, he shall not be compelled to appear or plead until fifteen days after the return day designated in the writ. The writ of attachment may be served as a summons upon defendants wherever they may be found in the State, by any person authorized to serve writs in like manner as summons in other civil cases.

10a. Alias and pluries writs.] § 10a. [Omitted]

11. Pursuit of property.] § 11. [Omitted]

12. Writ issued and served on Sunday.] § 12. [Omitted]

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1. Section 11 of this chapter.



13. Writs to other counties.] § 13. [Omitted]

14. Possession – Forthcoming bond.] § 14. The officer serving the writ shall take and retain the custody and possession of the property attached, to answer and abide by the judgment of the court, unless the person in whose possession the same is found shall enter into bond and security to the officer, to be approved by him, in double the value of the property so attached with condition that the said estate and property shall be forthcoming to answer the judgment of the court in said suit. The sheriff, or other officer shall return such bond to the court in which the suit is brought, on the day to which such attachment is returnable.

15. Bond or recognizance to pay judgment.] § 15. Any defendant in attachment, desiring the return of property attached, may, at his option, instead of or in substitution for the bond required in the preceding section, give like bond and security, in a sum sufficient to cover the debt and damages sworn to in behalf of the plaintiff, with all interest, damages and costs of suit, conditioned that the defendant will pay the plaintiff the amount of the judgment and costs which may be rendered against him in that suit, on a final trial, within ninety days after such judgment shall be rendered or a recognizance, in substance as aforesaid, may be taken in open court, and entered of record, in which case the court shall approve of the security and the recognizance made to the plaintiff, and upon a forfeiture of such recognizance judgment may be rendered and execution issued as in other cases of recognizance. In either case, the attachment shall be dissolved, and the property taken restored, and all previous proceedings, either against the sheriff or against the garnishees, set aside, and the cause shall proceed as if the defendant had been seasonably served with a writ of summons.

16. Neglect of officer to take bond – Proceedings.] § 16. [Omitted]

17. Neglect to return sufficient bond – Proceedings.] [Omitted]

18. Suit on bond.] § 18. [Omitted]

19. Sustenance of live stock – Compensation.] § 19. When any sheriff or other officer shall serve an attachment on horses, cattle or live stock, and the same shall not be immediately replevied or restored to the debtor, such officer shall provide sufficient sustenance for the support of such live stock until the same shall be sold or discharged from such attachment. He shall receive therefor a reasonable compensation, to be ascertained and determined by the court out of which the attachment issued, and charged in the fee bill of such officer, and shall be collectible as part of the costs.

20. Perishable property.] § 20. When any goods and chattels are levied on by virtue of any attachment, and the sheriff or other officer having custody of such goods and chattels is of the opinion that they are of a perishable nature and in danger of immediate waste or decay, such sheriff or other officer shall demand that the plaintiff in such attachment obtain from the court out of which the attachment issued an order permitting such property to be sold not later than 24 hours after the levy has been made, upon due notice of sale to the defendant and to the public as the court in its order shall require. The money arising from such sale shall be liable to the judgment obtained upon such attachment, and deposited in the hands of the clerk of the court to which the process is returnable.

If the plaintiff in the attachment fails or refuses to obtain such an order for sale of perishable property, the sheriff or other officer making the levy shall be absolved of all responsibility to any person for loss occasioned by



the failure to sell or care for such perishable property. The demand of the sheriff or other officer shall be written and shall be delivered to the plaintiff or his attorney or agent, and to the defendant if found. If defendant is not found, a copy of the demand shall be posted on the premises where the perishable items are located. Plaintiff's motion for an order of sale of perishable property shall be treated as an emergency motion.

21. Garnishment.] § 21. The sheriff or any other person authorized to serve writs of summons shall, in like manner as writs of summons are served in ordinary civil cases, summon, wherever they may be found in the State, the persons mentioned in such attachment writ as garnishees and all other persons whom the creditor shall designate as having any property, effects, choses in action or credits in their possession or power, belonging to the defendant, or who are in anywise indebted to such defendant, the same as if their names had been inserted in such writ. The persons so summoned shall be considered as garnishees. The return shall state the names of all persons so summoned, and the date of such service on each.

Persons summoned as garnishees shall thereafter hold any property, effects, choses in action or credits in their possession or power belonging to the defendant which are not exempt, subject to the court's order in such proceeding, and shall not pay to the defendant any indebtedness owed to him subject to such order, and such property, effects, choses in action, credits and debts shall be considered to have been attached and the plaintiff's claim to have become a lien thereon pending such suit. A security which is transferable as provided in Section 8-320 of the Uniform Commercial Code[1] is, for purposes of this Act,

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1. Chapter 26, § 8-320

only in the possession or power of the person which carries on its books an account in the name of the defendant in which is reflected an interest in such security, or, if such security has been pledged by the defendant, the pledgee of the defendant.

22. Notice by publication and mail.] § 22. When it shall appear by the affidavit filed or by the return of the officer, that a defendant in any attachment suit is not a resident of this State, or the defendant has departed from this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him, and that property of the defendant has been attached, or that persons having such property or effects, choses in action or credits belonging to defendant, or owing debts to him, have been summoned as garnishees, it shall be the duty of the clerk of the court in which the suit is pending to give notice, by publication at least once in each week for three weeks successively, in some newspaper published in this State, most convenient to the place where the court is held, of such attachment or garnishment, and at whose suit, against whose estate, for what sum, and before what court the same is pending, and that unless the defendant shall appear, give bail, and plead within the time limited for his appearance in such case, judgment will be entered, and the estate so attached or garnisheed sold or otherwise disposed of as provided by law. And such clerk shall, within ten days after the first publication of such notice, send a copy thereof by mail, addressed to such defendant, if the place of residence is stated in such affidavit; and the certificate of the clerk that he has sent such notice in pursuance of this section, shall be evidence of that fact.



23. Default.] § 23. No default or proceeding shall be taken against any defendant not served with summons within the State and not appearing, unless the first publication or personal service outside of the State be at least thirty days prior to the day at which such default or proceeding is proposed to be taken.

24. Continuance for want of publication or service.] § 24. If for want of due publication or service the cause shall be continued, the same proceedings shall be had at a subsequent return day to be fixed by the court, as might have been had at the return day at which the writ is returnable.

25. Filing of complaint – Answer or appearance – Time.] § 25. The complaint shall be filed ten days before the return day of the attachment, and if so filed the defendant, subject to the provisions of Section 10 of this Act,[1] shall file his answer or otherwise make his appearance on or before said day. If the complaint is not so filed the defendant shall not be compelled to appear or answer until fifteen days after the return day designated in the writ and if the complaint is not filed five days after the return day designated in the writ the defendant may, in the discretion of the court, have the suit dismissed.

26. Civil Practice Act – Application.] § 26. The provisions of the Civil Practice Act, including the provisions for appeal, and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act.

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1. Section 10 et seq. of this chapter.

27. Pleadings.] § 27. The defendant may answer, traversing the facts stated in the affidavit upon which the attachment issued, which answer shall be verified by affidavit; and if, upon the trial thereon, the issue shall be found for the plaintiff, the defendant may answer the complaint or file a motion directed thereto as in other cases, but if found for the defendant, the attachment shall be quashed, and the costs of the attachment shall be adjudged against the plaintiff, but the suit shall proceed to final judgment as though commenced by summons.

28. Amendments.] § 28. [Omitted]

29. Interpleading.] § 29. In all cases of attachment, any person, other than the defendant, claiming the property attached, or garnisheed may intervene, verifying his petition by affidavit, without giving bond, but such property shall not thereby be replevied; and the court shall immediately (unless good cause be shown by either party for a continuance), direct a jury to be impaneled to inquire into the right of the property. In all cases where the jury finds for the claimant, and that such claimant is also entitled to the possession of all or any part of such property, the court shall enter judgment for such claimant accordingly and order the property attached or garnisheed to which such claimant is entitled to be delivered to such claimant, and the payment of his costs in such action. In cases where the jury finds for a claimant but further find that such claimant is not then entitled to the possession of any such property such claimant shall be entitled to his costs; and where the jury find for the plaintiff in the attachment, such plaintiff shall recover his cost against such claimant. If such claimant is a non-resident of the State he shall file security for costs as in case of non-resident plaintiff.



30. Counterclaim.] § 30. Any defendant against whom an attachment may be sued out under this Act, may avail himself in his defense of any counter-claim properly pleadable by the laws of this State.

31. § 31. Repealed.]

31a. Change of parties – Other amendments.] § 31a. [Omitted]

32. § 32. Repealed]

33. Proceedings in aid.] § 33. Upon the return of attachments issued in aid of actions pending, unless it shall appear that the defendant or defendants have been served with process in the original cause, notice of the pendency of the suit, and of the issue and levy of the attachment, shall be given as is required in cases of original attachment; and such notification shall be sufficient to entitle the plaintiff to judgment, and the right to proceed thereon against the property and estate attached, and against garnishees, in the same manner and with like effects as if the suit had been commenced by attachment.

34. Effect of judgment.] § 34. When the defendant has been served with the writ, or appears to the action, the judgment shall have the same force and effect as in suits commenced by summons; and execution may issue thereon, not only against the property attached, but the other property of the defendant.

35. Judgment by default – Special execution.] § 35. When the defendant shall be notified as aforesaid, but not served with process within the State, and shall not appear and answer the action, judgment by default may be entered, which may be proceeded upon to final judgment as in other cases of default, but in no case shall judgment be rendered against the defendant for a greater sum than appears, by the affidavit of the plaintiff, to have been due

at the time of obtaining the attachment, with interest, damages and costs; and such judgment shall bind, and a special execution shall issue against the property, credits and effects attached, and no execution shall issue against any other property of the defendant; nor shall such judgment be any evidence of debt against the defendant in any subsequent suit.

36. Property levied upon.] § 36. [Omitted]

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38. Statement of participating judgments – Officer to divide proceeds.] § 38. [Omitted]

39. Payment into court.] § 39. [Omitted]

39a. Sale of livestock levied upon.] § 39a. [Omitted]

40. Appeals.] § 40. The plaintiff or defendant in any attachment, person intervening, and the sheriff, or either of them, who may feel aggrieved by the final order or judgment of the court, may prosecute appeals as by law is provided in other civil cases.

41. Fraud.] § 41. This act shall be construed in all courts in the most liberal manner for the detection of fraud.

42. Repeal.] § 42. [Omitted]

43. Repealed]

44. Amendment to pleadings. § 44. [Omitted]



## APPENDIX D

Illinois Revised Statutes 1973, Chapter 23:

11–21. § 11–21. Fraud – Penalty.] Any person who by means of any false statement, willful misrepresentation, or failure to notify the county department or the local government unit, as the case may be, of a change in his status as required by sections 11–18 and 11–19, for the purpose of preventing the denial, cancellation or suspension of his grant, or a variation in the amount thereof, or through other fraudulent device obtains or attempts to obtain, or aids or abets any person in obtaining financial aid under this Code to which he is not entitled, shall be guilty of a Class A misdemeanor.

If an applicant makes and subscribes an application form under Section 11–15 which contains a written declaration that it is made under penalties of perjury, knowing it to be false, incorrect or incomplete in respect to any material statement or representation bearing on his eligibility, income or resources, the offender shall be subject to the penalties for perjury as provided in Section 32–2 of the "Criminal Code of 1961", approved July 28, 1961, as amended.[1]

A person who receives financial aid for which he was not eligible as a result of his making any false statement, wilful misrepresentation, or failure to notify the county department or local governmental unit, as the case may be, of a change in his status as required by Section 11–18 and 11–19, for the purpose of preventing the denial, cancellation or suspension of his grant, or a variation in the amount thereof, or by other fraudulent device, or a person who knowingly aids or abets any person in obtaining financial aid for which he is not eligible, shall be answerable to the county depart-

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1. Chapter 38, § 32–2.

ment or the local government unit, as the case may be, for refunding the entire amount of aid received. If the refund is not made, it shall be recoverable in a civil action from the person who received the aid, or from anyone who wilfully aided such person to obtain the aid. If fraud is proven in such action, the court may as a penalty assess an additional sum of money, up to but not in excess of the entire amount of aid provided, against the recipient or against any person who wilfully aided the recipient. If assessed, the penalty shall be included in any judgment entered for the aid received, and paid to the county department or the local governmental unit, as the case may be.

Supreme Court, U. S.
FILED
Oct. 29 1976
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1407

JAMES TRAINOR, *etc., et al.*,

*Appellants,*

v.

JUAN HERNANDEZ, *et al., etc.,*

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

## BRIEF OF APPELLEES JUAN HERNANDEZ AND MARIA HERNANDEZ, individually and on behalf of all others similarly situated

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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No. 75-1407

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JAMES TRAINOR, *etc., et al.,*

*Appellants,*

v.

JUAN HERNANDEZ, *et al., etc.,*

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

---

## QUESTIONS PRESENTED

1. Whether appellants can obtain any relief by this appeal because of the failure of the clerk and sheriff to appeal the injunction in favor of the plaintiff class enjoining all county clerks and county sheriffs in Illinois from execution of the Illinois Attachment Act.

2. Whether the trial court correctly concluded that the principles of equity, comity, and federalism did not compel the dismissal of a federal action brought on behalf of a class of plaintiffs challenging the Illinois Attachment Act and seeking to enjoin the classes of county clerks and county sheriffs throughout the state from enforcing the Act where the federal relief sought

could not be obtained in a pending state civil lawsuit against the named plaintiffs brought pursuant to the challenged Act.

3. Whether the Illinois Attachment Act comports with the due process requirements of the Fourteenth Amendment to the United States Constitution.

## STATEMENT OF THE CASE

This class action was brought in federal district court pursuant to 42 U.S.C. §1983 challenging the constitutionality of the Illinois Attachment Act, Ill. Rev. Stat. ch. 11, §§1 *et seq.* and requesting declaratory and injunctive relief against its continued enforcement. (A. 28-49.) A three-judge court granted the relief requested and appellants filed this appeal pursuant to 28 U.S.C. §1253.

The Illinois Attachment Act authorizes a creditor with a money claim, whether liquidated or unliquidated and whether sounding in contract or tort, to obtain an attachment against the property of his alleged debtor either at the time of instituting suit or thereafter in any one of nine circumstances set forth in the Act (§1). (A. 22.) The creditor obtains a writ of attachment by filing a form affidavit with the clerk of the circuit court setting forth the nature and amount of claim, any one or more of the nine grounds for attachment and certain other information regarding the whereabouts of the debtor (§2). (A. 29.) Section 2a of the Act sets forth a sample affidavit which may be used by the creditor. (A. 30.) In all actions sounding in tort the creditor must first be examined by a judge concerning the cause of action and thereafter the judge endorses upon the



affidavit the amount of damages for which the writ shall issue (§2). (A. 30.) Except where an agency of the state is involved, the creditor is required to furnish bond in double the amount of the claim or double the amount of the property to be attached (§4a, 4b). (A. 31-32.)

Upon filing of the affidavit and posting the required bond the clerk issues the writ of attachment directing the sheriff to execute the writ and to serve it on the debtor (§§6, 8, 10). (A. 33-36.) The writ is made returnable on a return date designated by the creditor not less than ten nor more than sixty days after the date of the writ (§6). (A. 33.) The creditor need not file his complaint until ten days before the return date, and if he does not do so within five days after the return date the suit is subject to dismissal (§25). (A. 43.) The debtor is required to file his answer or otherwise make his appearance on or before the return date or fifteen days thereafter if the complaint has not been filed ten days prior to the return date (§25). (A. 43.)

Upon service of the writ the sheriff takes custody of the property or directs a third party in possession to withhold the attached property from the debtor (§§14, 21). (A. 38, 41.) The debtor can regain custody of his property prior to the trial on the creditor's claim in two ways. First, he can post a bond in double the value of the property attached, or in a sum sufficient to cover the amount of debt or damages alleged plus costs of the suit (§§14, 15). (A. 38.) Second, he can answer by affidavit denying the allegations set forth in the creditor's affidavit, and if the court finds for the debtor after a trial on the attachment issue, the writ will be quashed (§27). (A. 44.) If the debtor is unsuccessful in obtaining release of his property, it is held by the

sheriff or garnishee until the underlying claim is adjudicated.

On October 30, 1974 appellants[1] filed a complaint, affidavit for attachment, and writ of attachment and summons against plaintiffs Juan and Maria Hernandez[2] in the Circuit Court of Cook County, Illinois. (A. 9, 14-23.) All three documents were prepared on pre-printed forms supplied by the Clerk of the Circuit Court. (A. 14.) The complaint alleged that the plaintiffs had fraudulently concealed from the appellants funds on deposit in their credit union account and that as a result plaintiffs received public assistance for which they were not entitled. (A. 14.) The pre-printed affidavit contained a verbatim statement of the various grounds for attachment set forth in the Illinois Attachment Act. The appellants selected the seventh ground alleging that plaintiffs "within two years preceding the filing of this affidavit fraudulently concealed or disposed of property so as to hinder or delay their creditors." (A. 17-18.) The writ of attachment and summons directed the sheriff of Cook County to attach the funds in the plaintiffs' credit union account and to summon the plaintiffs to appear

[1] Appellant Trainor is the Director of the Department of Public Aid and Appellant O'Malley verified the complaint and attachment affidavit as the agent of the Department. (A. 8-9.)

[2] The appellees in this Court include the named federal plaintiffs, Juan and Maria Hernandez, members of the plaintiff class, and the federal defendants Finley and Elrod and the classes of county clerks and sheriffs which they represent. For purpose of clarity therefore this brief will use the terms "plaintiffs," "plaintiff class" and "defendants Finley and Elrod" to designate the named federal plaintiffs, the plaintiff class, and the defendant-appellees, respectively.



in court on November 18, 1974 to answer the complaint. (A. 21-23.) These documents were summarily stamped by a clerk and delivered to the sheriff's office for execution. (A. 9.)

The writ of attachment was served upon the credit union on November 5, 1974 and plaintiffs were served with copies of the writ, complaint, and affidavit on November 8, 1974. (A. 9.) Consequently Juan Hernandez was unable to withdraw funds from his account on November 11 to pay outstanding debts immediately due and payable. (A. 9, 25.)

On November 18, 1974 Juan Hernandez appeared in the courtroom designated in the writ of attachment and requested an immediate hearing. He was informed that the case had already been continued to December 19, 1974, pursuant to a practice in that courtroom of setting hearings on attachments for thirty days subsequent to the return date. (A. 10, 25.)

Plaintiffs then brought this class action in federal district court on December 2, 1974 on behalf of themselves and all other persons similarly situated against the Clerk of the Circuit Court of Cook County and a defendant class of all clerks for the judicial circuits of Illinois, the Sheriff of Cook County and a defendant class of all Illinois county sheriffs, and against appellants Trainor and O'Malley as agents of the Department of Public Aid. (A. 5.) Plaintiffs asserted that the Illinois Attachment Act violates the due process clause of the Fourteenth Amendment in that it authorizes creditors to attach assets of debtors upon conclusory allegations of fraudulent conduct (§ 1, parts sixth through ninth), without supporting facts or evidence, without judicial order or supervision, and without prior notice and hearing or the opportunity for

an immediate post-seizure hearing. (A. 10-11.) Plaintiffs prayed that defendants be ordered to dismiss the writ of attachment and return their property and that defendants be enjoined from further execution and enforcement of the Act. (A. 12-13.)[3]

The plaintiffs then moved for a temporary restraining order that appellants dismiss the writ of attachment and that the defendant sheriff release control of their property. (A. 24.) In support of this request Juan Hernandez submitted an affidavit which averred that he and his wife had four minor children, that he had no other savings, and that he needed the money in the account to pay his rent, utility bills and an automobile repair bill, and to help support his family while he went to the hospital for surgery on his back. (A. 24-25.) These averments were not contradicted by the appellants. Appellants submitted affidavits that Juan Hernandez had hospitalization benefits and sick pay provided by his employer (A. 50), but no evidence was introduced as to the actual benefits he would receive in case of hospitalization. Appellants also submitted an affidavit which showed that plaintiff Maria Hernandez had been laid off on November 1, 1974. (A. 51.) No evidence was introduced by appellants regarding plaintiffs' current income or assets at the time of the attachment. No findings of fact or rulings were made on plaintiffs' motion because the parties reached an agreement whereby appellants agreed to release one-half of the attached funds. The parties also agreed to stay the state court proceedings pending resolution of the federal suit. (R. Item 22, p. 2; Item 26, p. 3.) The appellants ultimately dismissed the state suit.

[3] Plaintiffs also prayed for damages for deprivation of their civil rights. (A. 13.)



Appellants moved to dismiss (A. 55-56) and plaintiffs moved for summary judgment (A. 57) and for certification as a plaintiff and defendant class action (R. Item 17). A three-judge court was designated to hear these matters pursuant to 28 U.S.C. §2284 on March 21, 1975.

On October 31, 1975 the district court ordered that this suit be maintained as a plaintiff and defendant class action. (A. 63-64.) The court found that the plaintiffs represent the class of all persons who now have or may have their property attached upon a creditor's allegation of fraudulent conduct pursuant to the Illinois Attachment Act, §1 parts sixth through ninth, and that the plaintiff class meets all the requirements of Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The court also found that defendants Finley and Elrod represent the class of clerks of the circuit courts of Illinois and the class of Illinois county sheriffs respectively, and that these classes meet the requirements of Rules 23(a) and 23(b)(1)(A) of the Federal Rules of Civil Procedure.

The district court entered its judgment and opinion on December 15, 1975. 405 F.Supp. 757. The court found that *Younger v. Harris*, 401 U.S. 37 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) did not prevent it from considering plaintiffs' constitutional claim since the Illinois Act is not "in aid of and closely related to criminal statutes." *Id.* at 760. And since the Act is "patently and flagrantly violative of the Constitution." *Id.* The court went on to declare the Act to be "on its face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution." *Id.* at 762. The court ordered defendants Finley and Elrod to release the property of

plaintiffs and members of the plaintiff class, enjoined defendants Finley and Elrod and the defendant class of clerks and sheriffs from issuing and executing writs of attachment pursuant to §1, subsections sixth through ninth of the Act, and enjoined appellants Trainor and O'Malley from authorizing and processing applications for attachments pursuant to those sections of the Act. The issue of damages was remanded to the single district judge for determination. (A. 67.) This issue has been continued pending resolution of this appeal. The appellants filed a motion for a stay of injunction pending appeal which was denied by the three-judge court on February 25, 1976, the Honorable Wilbur F. Pell, Jr., United States Circuit Court Judge, dissenting. (A. 81).

Appellants Trainor and O'Malley and defendants Finley and Elrod filed separate notices of appeal of the order of December 15, 1975. None of the parties appealed the class action order of October 31, 1975. Trainor and O'Malley perfected their appeal by filing a Jurisdictional Statement and this court noted probable jurisdiction on June 7, 1976. Finley and Elrod never perfected their own appeal, but instead have appeared in this court as appellees filing a brief in support of appellants' position.

## SUMMARY OF ARGUMENT

### I

This appeal reaches this Court in such a posture that no effective relief can be given the appellants. The three-judge district court enjoined the defendant classes



of Illinois county clerks and county sheriffs from issuing and executing writs of attachment against the plaintiff class of all persons who have had or will have their property attached pursuant to certain sections of the Illinois Attachment Act. Although the named clerk and sheriff filed a notice of appeal of this injunction, their appeal was never docketed and they appear in this Court as appellees. Therefore they cannot now ask this Court to vacate the injunction against the defendant classes. Nor can appellants, attachment creditors in the state court suit, appeal those portions of the injunction against the defendant classes in favor of those members of the plaintiff class whose property was or would have been attached by other creditors. Thus, regardless of the outcome of the present appeal, appellants could still not obtain prejudgment attachments, since the injunction against all clerks and sheriffs in Illinois must remain in full force and effect. Since there is no effective relief which appellants can obtain by this appeal, the appeal should be dismissed.

### II

The principles of equity, comity, and federalism enunciated by this Court in *Younger v. Harris*, 401 U.S. 37 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) were fully respected by the three-judge court in reaching the merits of the constitutional claim. By doing so, the district court fulfilled its role as the primary guarantor of the plaintiffs' federal rights without interfering with or duplicating the state court proceeding and without reflecting negatively upon the state court's ability to enforce constitutional principles.

Federal injunctive relief was appropriate in the instant case since neither the named plaintiffs nor members of the plaintiff class had "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Huffman v. Pursue, Ltd., supra* at 594. Resolution of the constitutional issue in the state civil collection suit would only have been binding on the parties to that proceeding but would not have protected the named plaintiffs or other members of the plaintiff class from continued utilization of the statute by any creditor in Illinois. Nothing would have prevented future attachments against the named plaintiffs or members of the plaintiff class who could only obtain a release of their property in the state court after the constitutional deprivation and the resulting irreparable injury had already occurred. Thus, a *Younger* dismissal of the federal action was not required since the threat to the plaintiffs' federally protected rights could not have been eliminated by the defense to a single state court suit. *Younger v. Harris, supra* at 46. Furthermore, because of the procedures for appealing decisions on attachments in Illinois, the constitutional issue would inevitably have become moot by a resolution of the suit on the money claim. Therefore, plaintiffs would not have had the opportunity to appeal an adverse ruling on the constitutional issue through the state appellate network and ultimately to this Court, a right equally as important as the right to raise the constitutional claim in the first instance.

In contrast to the state court collection suit brought by a single creditor against two joint debtors, the federal claim was brought pursuant to 42 U.S.C. §1983 against state officials charged with the execution of the Illinois Attachment Act. Section 1983 has been



characterized by this Court as a uniquely *federal* remedy against incursions by state authorities upon rights secured by the Constitution and laws of the United States and accordingly has been found to be an express exception to the proscriptions of the Anti-Injunction Act. Furthermore, in order to obtain relief for all persons similarly situated against the continuing operation of the Attachment Act, plaintiffs proceeded by way of a class action, a method which Congress established for vindicating the rights of large numbers of individuals in a single civil action. Therefore, only through a §1983 federal court suit could plaintiffs and members of the plaintiff class obtain complete, swift, and adequate relief against the continuing operation of the Attachment Act.

The federal injunction in no way interfered with pending state court litigation. Under *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Gerstein v. Pugh*, 420 U.S. 103 (1975) prejudgment attachment in Illinois in an extrajudicial proceeding, and an injunction against its maintenance will not affect the litigation on the merits of the underlying civil collection suit. The appellants and the state court itself were always free to proceed with the pending suit on the appellants' money claim.

Unlike *Younger* and *Huffman*, the federal injunction did not disrupt the state's efforts to enforce its criminal laws. Attachment is a general creditor's remedy, designed to facilitate collection of a possible judgment on a money claim. Attachment itself is not a criminal proceeding, nor is it related in any way to Illinois' criminal laws. Furthermore, as the court below noted, it is mere happenstance that the state was the attachment creditor in the pending civil suit, for under the

Attachment Act any creditor, public or private, can obtain an attachment in conjunction with any type of money claim. The existence of a plaintiff class consisting of numerous persons whose property had been attached by private creditors for ordinary civil claims underscores the general civil nature of the Attachment Act.

The federal court suit did not result in a duplication of the state legal proceedings. Since attachment is an extrajudicial proceeding, the resolution of the constitutional issue in federal court did not duplicate pending or completed proceedings in the state court. Furthermore, because protection for the plaintiffs and the plaintiff class against the continued operation of the Attachment Act could not have been obtained by defending the state collection suit, the federal suit for class injunctive relief against the state officials charged with executing the Act did not duplicate the state court proceeding. On the contrary, the federal suit has prevented a multiplicity of state suits by resolving the claims of all members of the plaintiff class in a single suit. For similar reasons the federal court action did not reflect negatively on the state court's ability to enforce constitutional principles since the state court could not have afforded the plaintiffs or the plaintiff class complete relief in the collection suit pending before it.

Finally, as the district court found, the Illinois Attachment Act is patently and flagrantly violative of the Constitution. This factor, along with the others set forth above, clearly justified the federal court's decision to reach the constitutional merits of this case.



## III

After reviewing the decisions of this Court regarding the constitutionality of creditors' remedies, the court below concluded that due process requires either notice and a hearing prior to summary seizure of a debtor's property or alternative procedural safeguards such as those approved by this Court in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974) and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). The district court correctly found that the Illinois Attachment Act is patently violative of the due process clause since it neither provides for prior notice and hearing, nor does it provide three crucial safeguards to protect the debtor from a wrongful seizure of his property.

First, unlike the seller in *Mitchell*, the Illinois attachment creditor need not set forth specific facts in his affidavit which would entitle him to a writ of attachment. Instead, a writ will automatically issue upon conclusory allegations in verbatim statutory language on a pre-printed form supplied by the clerk of the court. The requirement for specific facts is especially crucial where, as in the instant case, fraud is alleged as grounds for the attachment so that a judicial officer can evaluate whether the specific elements of fraud have been properly alleged and so that the debtor is apprised of the facts he will have to rebut at any post-seizure hearing.

Second, a creditor need not present a factual affidavit to a judge for a determination of whether a writ shall issue, but instead a writ will automatically issue from a clerk of the court who has no authority to determine the legal sufficiency of the creditor's allegations. Judicial scrutiny of the affidavit is particularly important in a complex case such as fraud where a

ministerial officer would be unable to determine whether the proper factual elements of fraud have been alleged.

Finally, and most significantly, the Attachment Act contains no express provision for an immediate post-seizure hearing which would cut to a bare minimum the length of an ex parte seizure. The creditor can set the return date of the writ anywhere from ten to sixty days after its issuance and the court, as in the instance case, may set the hearing on the attachment well after the return date. There is no provision in the Attachment Act which would allow the debtor to move for an earlier hearing, and the ultimate date of the hearing is solely up to the discretion of the court. Under these circumstances an express provision for an immediate post-seizure hearing is necessary for the proper protection of the debtor's interests.

The absence of these safeguards against a wrongful seizure of property is especially serious in the instant case where an unsecured creditor has virtually unlimited power to seize any and all goods of an alleged debtor for any type of money claim. Unlike the seller in *Mitchell* the attachment creditor is not limited to seizure of goods in which he has an uncontested security interest. The impact on the debtor in such a case can indeed be severe, especially where the debtor may not be able to obtain a bond for the release of his property. In light of these considerations, it can be seen that the Illinois Attachment Act does not afford a proper constitutional accommodation between the interests of the creditor and the debtor, but instead clearly fails to provide the debtor with adequate procedural safeguards against the arbitrary seizure of his property.



## ARGUMENT

### I.

### SINCE THE CLERK AND SHERIFF HAVE NOT APPEALED, THE INJUNCTION AGAINST ALL THE COUNTY CLERKS AND SHERIFFS IN ILLINOIS IN FAVOR OF THE PLAINTIFF CLASS MUST STAND REGARDLESS OF THE OUTCOME OF THE APPEAL OF TRAINOR AND O'MALLEY.

On October 31, 1975, prior to the decision of the three-judge court, the district court ordered that this suit could proceed on behalf of a class of plaintiffs subject to certain sections of the Attachment Act against the defendant classes of county clerks and sheriffs throughout Illinois.[4] Subsequently the three-judge court enjoined the defendant classes of county clerks and sheriffs from issuing and executing writs of attachment against the plaintiff class and ordered them to cause the release of all property of the plaintiff class currently subject to attachment. (A. 66.) The court also enjoined appellants Trainor and O'Malley from authorizing and processing applications for writs of attachment against the plaintiff class. (A. 66.) This provision of the injunction is superfluous since the only persons

[4]The court properly ruled on plaintiffs' motion for class certification prior to a ruling on the merits by the three-judge court. Rule 23(c)(1) Federal Rules of Civil Procedure. *See, Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974). Furthermore, since a three-judge court is required to dismiss under *Younger*, [*Steffel v. Thompson*, 415 U.S. 452, 475 n.7 (1974)] that issue was properly decided by the three-judge court after class certification by the single judge.

authorized to execute the Attachment Act are enjoined from doing so.[5]

Defendants Finley and Elrod and appellants Trainor and O'Malley filed separate notices of appeal of the court's judgment. (A. 79-80.) Finley and Elrod never docketed their appeal by filing a jurisdictional statement and therefore it is subject to dismissal under United States Supreme Court Rule 14(3). *See, Shapiro v. Doe*, 396 U.S. 488 (1970). Nor have they joined the appellants in the present appeal but instead have appeared as appellees and have filed a brief supporting appellants' position. Since Finley and Elrod have not docketed their appeal, they cannot now ask this Court to vacate the injunction against the defendant classes of clerks and sheriffs. *See, Swarb v. Lennox*, 405 U.S. 191, 201 (1972).

Appellants Trainor and O'Malley purport to appeal the entire order of the three-judge court, including those portions of the order directed solely against the classes of county clerks and sheriffs in favor of the plaintiff class. It is clear, however, that a party may only appeal a judgment which is directed against him. *Seaboard Surety Co. v. United States*, 306 F.2d 855 (9th Cir. 1962); *Milgram v. Loew's, Inc.*, 192 F.2d 579

[5]Trainor and O'Malley are not the state officers charged with the execution and enforcement of the Attachment Act but are sued in the posture of attachment creditors who utilized the Act as any other creditor, public or private. Thus the injunction against them could have been issued by a single judge. The three-judge court was required to issue the injunctions against Finley and Elrod since the clerk and sheriff are specifically required by the Illinois Act to carry out its provisions. 28 U.S.C. §2281. Since Finley and Elrod did not appeal the decision of the three-judge court, it is questionable whether this Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1253.



(3rd Cir.) *cert. denied*, 343 U.S. 929 (1951); *Spriggs v. Stone*, 174 F.2d 671 (D.C. Cir. 1949); *Stearns-Roger Mfg. Co. v. Brown*, 114 F. 939 (8th Cir. 1902). The plaintiff class consists of numerous persons throughout Illinois who have had or will have their property attached by any creditor, not merely by the appellants. These members of the plaintiff class acquired a separate legal status when the class was certified by the district court. *See, Sosna v. Iowa*, 419 U.S. 393, 399 (1975). Appellants cannot appeal the injunctions entered in favor of these class members against other parties to the litigation who have not appealed and particularly have no standing to appeal a judgment in favor of those members of the class whose property was attached by other creditors. Regardless of the outcome of the present appeal, then, the injunction against the defendant class members must stand.[6]

In the light of the above considerations there is no effective relief which appellants can obtain by this appeal. Even if Trainor and O'Malley were to prevail on the appeal of the injunction against them, they could still not obtain prejudgment attachments since all clerks

[6]Even if this Court found that equitable relief was not proper in light of *Younger* and *Huffman*, this would not affect the injunction against Finley and Elrod. *Younger* is not a jurisdictional issue since this Court has allowed the parties to waive it. *See, Sosna v. Iowa*, 419 U.S. supra at 396, n.3; *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 595 n.1; 420 U.S. at 613, n.1 (Brennan, dissenting). Failure to appeal an order should be construed as a waiver of all non-jurisdictional issues. Since there is no question that the court had jurisdiction pursuant to 28 U.S.C. §1343(3), the injunction against Finley and Elrod must stand. Finley and Elrod's appellees' brief in support of appellants' position on the *Younger* issue comes too late to affect the judgment against them.

and sheriffs of Illinois are enjoined from issuing and executing writs of attachment. Therefore this court should not exercise its jurisdiction and this appeal should be dismissed.

## II.

**THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE PRINCIPLES OF EQUITY, COMITY, AND FEDERALISM EXPRESSED IN *YOUNGER V. HARRIS* AND *HUFFMAN V. PURSUE, LTD.* DID NOT BAR FEDERAL RESOLUTION OF THE CONSTITUTIONAL ISSUES IN THE INSTANT CASE.**

The three-judge court below recognized that principles of equity, comity, and federalism as enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), had to be taken into account in deciding whether the federal court should resolve the constitutional issues presented in the class action complaint. After considering these principles, the court concluded that dismissal of the instant case was not required because (1) the Illinois Attachment Act was not in aid of and closely related to criminal statutes and (2) the Illinois Attachment Act was "patently and flagrantly violative of the constitution." 405 F.Supp. at 760. For these reasons, and also based upon additional considerations not discussed by the trial court, plaintiffs submit that the principles of equity, comity, and federalism were fully respected by the trial court's decision to hear and decide the constitutional claim. On the other hand, a ruling that



the trial court should have dismissed the complaint would truly "turn federalism on its head." *Steffel v. Thompson*, 415 U.S. 452, 457 (1974).

### A. There is an overriding federal interest in vindicating the plaintiff class' §1983 claim for state-wide injunctive relief against unconstitutional deprivation of their property rights.

The principles of comity and federalism enunciated by this Court in *Younger v. Harris* take cognizance of the legitimate interests of both state and federal governments. 401 U.S. at 44. Thus, any analysis of these respective interests must take into account the strong interest of the federal government in vindicating the constitutional rights of its citizens, especially in the instant case of a §1983 claim for state-wide class relief against unconstitutional deprivations of property rights. Plaintiffs claim that the district court below fulfilled its role as a primary guarantor of federal rights without interference with state judicial functions.

At the outset of this analysis the different nature of the state and federal court proceedings must be kept in mind. The state court proceeding was a collection suit brought by a single creditor against two debtors in which the creditor obtained a prejudgment attachment

of the debtors' assets pursuant to the Illinois Attachment Act.[7] Had the attachment debtors been able to successfully attack the constitutionality of the Attachment Act in state court, they would have eventually obtained a release of their property. However, the decision of a circuit court trial judge is not binding on any other judge in Illinois. Therefore, neither these debtors nor any other debtors in Illinois would be protected against future attachments by this creditor or any other creditors utilizing the Attachment Act.

The federal lawsuit, on the other hand, was brought by a class of debtors and potential debtors throughout the state against two classes of state officials in all of Illinois' counties who were charged under the Attachment Act with carrying out its provisions.[8] The suit was brought pursuant to 42 U.S.C. §1983 which this Court has characterized as "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of

[7]Throughout their brief appellants imply that as state officials they are entitled to special considerations. By doing so they attempt to obfuscate the real issues in this case. Although the plaintiff in the collection suit was the Illinois Department of Public Aid, it utilized a prejudgment remedy available to all creditors, and therefore for purposes of both the *Younger* and constitutional issues occupy the status of any other creditor. As the court below noted, "it is mere happenstance that the State of Illinois was the petitioner in the attachment proceedings." 405 F.Supp. at 760.

[8]While the appellants were also named as defendants in the federal suit, injunctive relief against them was not necessary to stop the operation of the Attachment Act. See discussion *supra* at 8.



the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). Section 1983, along with other Reconstruction era legislation established "the role of the Federal Government as a guarantor of basic federal rights against state power," *Id.* at 239, and in conjunction with the Judiciary Act of 1875[9] constituted the lower federal courts as "the *primary* and powerful reliance for vindicating every right given by the Constitution, the laws, and treaties of the United States." *Steffel v. Thompson*, 415 U.S. 452, 464 (1974).[10] Accordingly, §1983 has been the common vehicle for constitutional challenges to state summary creditor remedies and the federal courts have consistently reached the merits of the plaintiffs' claims even though there were pending state court proceedings. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972); *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Guzman v. Western State Bank of Devils Lake*, 516 F.2d 125 (8th Cir. 1975); *United States General, Inc. v. Arndt*, ___ F.Supp. ___ (No. 75-C-204, E.D. Wisc. August 4, 1976); *Hutchison v. Bank of North Carolina*, 392 F.Supp. 888 (M.D. N.C. 1975); *Bunton v. First Nat'l Bank of Tampa*, 394 F.Supp. 793 (M.D. Fla. 1975); *Douglass Research and Chemical, Inc. v. Solomon*, 388 F.Supp. 433 (E.D. Mich. 1975); *Garcia v. Krausse*, 380 F.Supp. 1254 (S.D. Tex. 1974) *rev'd on other grounds*, 534 F.2d 609 (5th Cir. 1976); *Manning v. Palmer*, 381 F.Supp. 713 (D. Ariz. 1974).

[9]18 Stat. 470. That Act gave general federal question jurisdiction to the federal courts. *See*, 28 U.S.C. §1331.

[10]It was these considerations which led this Court to find §1983 to be an "expressly authorized" exception to the Anti-Injunction Act, 28 U.S.C. §2283. *Mitchum v. Foster*, 407 U.S. at 238-243.

In addition to stating a federal claim under §1983 the plaintiffs utilized a method provided by Congress for remedying widespread constitutional deprivations–the class action. Pursuant to Rule 23 of the Federal Rules of Civil Procedure the plaintiffs brought this suit on behalf of all other debtors and potential debtors in Illinois subject to the challenged sections of the Attachment Act. (A. 6-7.) Based upon the evidence the district court found that the plaintiff class satisfied all the requirements of Rule 23(a) and 23(b)(2). (A. 63.) Class injunctive relief against the clerk and sheriff of Cook County, however, would have only prevented prejudgment attachments in that county. Since there are one hundred and one counties throughout Illinois, plaintiffs moved for certification of defendant classes to prevent "inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Rule 23(b)(1)(A), Federal Rules of Civil Procedure. (A. 7.) The district court found the defendant class to meet the requirements of 23(a) and 23(b)(1)(A). (A. 64.) This order has not been appealed and therefore the court's finding cannot be challenged on appeal.

The class action is the method which Congress established for vindicating the rights of large numbers of individuals through a single civil action. *See*, 7 Wright and Miller, *Federal Practice and Procedure*, §1751 (1972). It is now generally recognized that Rule 23(b)(2) is specifically designed for obtaining equitable relief in civil rights cases. Advisory Committee's Note 28 U.S.C.A. Rule 23(b)(2) at 298-299. *See*, 7A Wright and Miller, *supra*, §1771 at 663; *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975); *Fujishima v.*



*Board of Education*, 460 F.2d 1355, 1360 (7th Cir. 1972). Appropriately, numerous federal courts have authorized §1983 plaintiff and defendant class action in constitutional attacks on creditors' remedies. *See, e.g., Gibbs v. Titelman*, 369 F.Supp. 38, 51-53 (E.D. Pa. 1973), *rev'd on other grounds* (3rd Cir.) 502 F.2d 1107, *cert. denied*, 419 U.S. 1039 (1974) (self-help repossession statute–plaintiff and defendant classes); *Lynch v. Household Finance Corp.*, 360 F.Supp. 720, 722 n.3 (D.Conn. 1972), *on remand from* 405 U.S. 538 (1972) (prejudgment attachment and garnishment statute–plaintiff class of persons subject to statute, defendant class of creditors);[11] *Reeves v. Motor Contract Co. of Georgia*, 324 F.Supp. 1011 (N.D. Ga. 1971) (prejudgment wage garnishment statute–plaintiff class of state residents subject to statute; *Santiago v. McElroy*, 319 F.Supp. 284 (E.D. Pa. 1970) (distress for rent statute–plaintiff class of low-income consumers); *Swarb v. Lennox*, 314 F.Supp. 1091 (E.D. Pa. 1970) *aff'd* 405 U.S. 191 (1972) (confession of judgment statute–plaintiff class of state residents earning less than $10,000 per year).

Thus, in contrast to the state court suit for a money claim by a single creditor against joint debtors, the federal suit involved a uniquely federal claim for class relief against state officials pursuant to §1983 and Rule 23 of the Federal Rules of Civil Procedure. The district court's ruling is a classic example of federal relief against widespread constitutional deprivations by state authorities.

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[11]The Connecticut statute struck down in *Lynch* is similar to the Attachment Act being challenged here. See discussion *infra* at 30-31.

**B. Federal injunctive relief was necessary to prevent great and immediate irreparable injury to plaintiffs and members of the plaintiff class.**

A person whose property is attached pursuant to the Illinois Attachment Act faces irreparable injury which is both "great and immediate." *Younger* at 46. The injury which results is not merely "the cost, anxiety, and inconvenience" of litigation, which this court has found insufficient to justify federal injunctive relief. *Id.* The injury is the very real and tangible loss of one's property and the economic and social consequences resulting therefrom. This loss is truly immediate–it occurs the moment the writ of attachment is served and the debtor is denied access to his property. The injury begins before the debtor has been able to interpose any defense and results "from the very bringing of the state proceedings." *Younger* at 56 (Stewart, concurring).

That prejudgment attachment can have a severe and immediate impact upon the debtor can be seen from the case of the named plaintiffs. At the time of the attachment Mrs. Hernandez had just been laid off from her job. (A. 51.) Mr. Hernandez had to rely on his sole income as a laborer to support his wife and four minor children. There were numerous current expenses and outstanding bills to pay, including rent and utilities. (A. 25.) Furthermore, Mr. Hernandez needed to take off from work for surgery on his back. While his employer provided some hospitalization and sick leave benefits, it was not clear how long he would have been away from his job and whether these benefits would have covered his expenses. The plaintiffs' only savings was the money they had accumulated in their credit union account at



work by authorizing deductions from their paychecks. At the time they most needed their savings they were denied access without notice. Clearly great and immediate injury could have occurred had the federal court not intervened.[12]

It should also be pointed out that this court has refused to vary the requirements of due process depending on the nature of the property seized or the potential economic impact on the debtor. *See, Fuentes v. Shevin, supra* at 89-90; *North Georgia Finishing, Inc. v. Di-Chem, Inc.* 419 U.S. 601, 608 (1975). Thus, any significant taking of property without constitutional safeguards is likely to result in irreparable injury. *North Georgia Finishing* at 608. Furthermore, regardless of the actual economic impact upon a debtor resulting from an attachment, the deprivation of one's constitutionally protected property rights must be seen as irreparable *per se* since "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Fuentes v. Shevin, supra* at 82.

Although no court could rectify the injury which had already occurred, plaintiffs turned to the federal court to obtain a release of their property to prevent future deprivations of their constitutionally protected property rights and to obtain similar relief for persons similarly situated. A federal remedy for precisely this type of claim had been provided by Congress in §1983 and Rule 23 of the Federal Rules of Civil Procedure, and plaintiffs relied upon the ample federal precedent in

[12] As a result of the settlement of the motion for a temporary restraining order plaintiffs received half of their funds, or approximately $600 which greatly alleviated their economic plight.

identical cases for obtaining swift relief. As a result of the federal suit plaintiffs obtained a release of one-half of their property within one month and a state-wide injunction on behalf of the class in one year.[13] Thus, the federal courts afforded plaintiffs and members of the plaintiff class a complete, adequate, and swift remedy for their federal claim.

### C. Neither plaintiffs nor members of the plaintiff class had an adequate remedy for their federal claim in the pending state court proceedings.

The necessary predicate for a *Younger* dismissal is "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Huffman* at 594. Plaintiffs claim that such an opportunity did not exist in the present case because (1) the threat to the federally protected rights of both the named plaintiffs and the plaintiff class could not be eliminated by the defense of a single suit; and (2) an appeal of the constitutional issue through the state appellate court system and ultimately to this Court would inevitably become moot.

[13]Appellants claim that had plaintiffs raised their constitutional objections in state court they would have had a hearing on December 19, 1975, one year before the federal decision. (Apps. Br. 20.) Appellants fail to recognize that the constitutional issue would have to be briefed and a decision might not be rendered for many months. Furthermore, after one year in federal court plaintiffs obtained state-wide class relief whereas any state court decision would only have been binding on the parties.



#### 1. Resolution of the constitutional claim in the pending state proceeding would not protect plaintiffs or members of the plaintiff class from the continuing operation of the Attachment Act.

Federal deference to state court proceedings is not required when "the threat to the plaintiffs' federally protected rights . . . cannot be eliminated by his defense against a single prosecution." *Younger* at 46. Plaintiffs contend that federal injunctive relief was appropriate in the instant case since neither the plaintiffs nor the members of the plaintiff class could eliminate the threat to their federally protected rights by raising their constitutional claim as a defense in the pending state court suit.

If plaintiffs had successfully raised the constitutional issue in the pending collection suit against them, the resolution of that issue would be *res judicata* only between the plaintiffs and appellants. Furthermore, the decision of a circuit court judge has no *stare decisis* effect on any other judge in Illinois. Consequently, the resolution of the constitutional issue in the pending suit would not protect the plaintiffs from future attachments by other creditors, nor would it protect members of the plaintiff class from attachment by any creditor including appellants.[14]

Plaintiffs might have attempted to obtain an injunction against continued operation of the Attachment Act by filing a third party claim against the

[14]In a criminal prosecution, resolution of a constitutional issue would at least protect the state defendant since that court's ruling would be *res judicata* between the defendant and the state, the only party which can bring a criminal action. In contrast, any alleged creditor can obtain a prejudgment attachment in Illinois.

sheriff or clerk in the pending civil suit.[15] Alternatively plaintiffs might have filed a separate suit for injunctive relief.[16] The possibility of maintaining a third party suit or a separate suit in state court, however, does not require federal restraint. *Younger* only requires dismissal of the federal suit where the threat to federally protected rights can be eliminated by the *defense* of a *single* state court suit. *Id.* at 46. Comity and federalism could not possibly require an *affirmative* action either by filing a separate suit or even by filing a third party complaint. Such a result would not effectuate the *Younger* policy of avoiding a duplication of legal proceedings and would be contrary to this Court's pronouncement that under §1983 a plaintiff need not exhaust his state remedies before applying to the federal courts for relief. *See, Monroe v. Pape*, 365 U.S. 167 (1961).

[15]Leave to file such a third party claim is up to the discretion of the court. Ill. Rev. Stat. ch. 110, §25(1). Furthermore, denial of leave to file such a complaint is an interlocutory order and can only be appealed by permission of the trial and appellate courts. *See*, Illinois Supreme Court Rule 308, Ill. Rev. Stat. ch. 110A, §308.

[16]While under the Illinois Civil Practice Act there has been a merger of law and equity (*see*, Ill. Rev. Stat. ch. 110, §31) the Circuit Court of Cook County has retained that traditional distinction for purposes of case assignment. The collection suit in the instant case was assigned to the Municipal Department which hears civil claims at law for less than $15,000 and proceedings ancillary and supplementary thereto. General Order No. 1, §2.2(h), Circuit Court of Cook County (1972). Suits for injunctive relief, class actions, and similar equitable claims are assigned to the County Department, Chancery Division. General Order No. 1, §2.1. Thus, had plaintiffs filed a suit for the injunctive relief in state court, their suit would not have been assigned to the municipal judge hearing the collection case but to a state chancellor.



It must also be kept in mind that in addition to the named plaintiffs and members of the plaintiff class currently subject to an attachment, the plaintiff class consists of many persons whose property had not been attached at the time of certification but who were subject to attachment at any time without prior notice. These persons have a separate legal status apart from the named plaintiffs and their interests are similarly worthy of protection. *See, Sosna v. Iowa*, 419 U.S. 393, 399 (1975); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). These class members, however, did not have "the opportunity to raise and have timely decided the federal issues involved," *Huffman* at 594, since they were not involved in any state proceedings at the time the class was certified.[17] Requiring these class members

[17]Relief for these class members could not have been obtained in the pending state attachment suit against the named plaintiffs. To obtain such relief plaintiffs would have had to file a third party plaintiff class action against two classes of third party defendants. Such an action, however, is without precedent in Illinois and could not proceed under existing case law. *See, e.g., Johnson v. Moon*, 3 Ill. 2d 561, 569, 121 N.E.2d 774, 778 (1954). Furthermore, it is not at all clear that a plaintiff and defendant class action could be maintained in the state courts. Illinois has no class action rules and the Federal Rules have not been used as a guideline. *See, e.g., Pearlman v. First Nat'l Bank of Chicago*, 15 Ill. App.3d 784, 305 N.E.2d 231 (1973). The courts have had broad discretion in this area and no clear cut rules have emerged. *See*, Tornquist, *Roadmap to Illinois Class Actions*, 5 Loyola U.L.J. 45, 46-49 (1975). Defendant class actions do not seem to be allowed at all. *Rubloff and Co. v. Leaf*, 347 Ill. App. 191, 196, 106 N.E.2d 735, 735 (1952); *Gaffney v. Shell Oil Co.*, 19 Ill. App.3d 987, 312 N.E.2d 75[illegible] 759 (1974). *See*, Tornquist, *supra* at 74 n.19. Even if such an action could be maintained, however, it would not satisfy the requirement of a *Younger* dismissal.

to await until they are subject to an illegal attachment before their federal rights can be vindicated is surely not required by comity and federalism. *See, Steffel v. Thompson*, 415 U.S. 452, 472-473 (1974).

In *Gerstein v. Pugh, supra,* this court recognized the role of the federal courts in providing protection against continuing constitutional deprivations to both the named federal plaintiffs and to unnamed members of the plaintiff class, even after the immediate threat to the named plaintiffs' rights has disappeared. *Gerstein* was a class action challenge to pretrial detention on an information of a prosecutor without a hearing before a judge. Before the case on the merits was resolved by the Court, the named plaintiff had been convicted, thereby mooting his claim that his pre-trial detention was improper. This Court found that the claim was nonetheless still live for the unnamed class members. The Court noted that although the named plaintiff's pre-trial detention had ended, he "could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures." *Id.* at 110 n.11.

Similarly, in the instant case, although the named plaintiffs might regain their property in the state court proceeding, they "could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be (subject to) the allegedly unconstitutional procedures." *Id.* Since the release of the property by the state court would not have protected either the named plaintiffs or the plaintiff class from continuing deprivations, federal injunctive relief was appropriate.

Absent the opportunity to have the federal claim vindicated in the pending state proceeding, federal



injunctive relief "does not result in duplicative legal proceedings" nor does it "reflect negatively upon the state court's ability to enforce constitutional principles." *Steffel v. Thompson*, 415 U.S. 452, 462. *See, Huffman* at 602-604. Since class injunctive relief could not have been obtained in the state court suit, the federal suit did not result in a duplication of those proceedings. On the contrary, the federal suit has actually prevented a multiplicity of state proceedings. Without class injunctive relief, each attachment debtor would have had to raise his constitutional claim in a separate proceeding after his property had been attached. This is not only a burden upon each individual debtor, it would also put a great burden on the state courts. It would take hundreds of suits in the state courts to bring about the result reached in one federal class action. Thus, only the federal court provided plaintiffs and the plaintiff class with "a single suit . . . adequate to protect the rights asserted." *Younger*, 401 U.S. at 44. Cf. *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952).[18]

[18]Two lower federal courts have recognized the role of federal class actions in avoiding a duplication of state legal proceedings. In *Garrett v. Bamford*, 538 F.2d 63 (3rd Cir. 1976) the court found that the Tax Injunction Act, 28 U.S.C. §1341, did not bar federal jurisdiction over a class action attack against allegedly unconstitutional state tax assessments where the state remedy was clearly designed for the individual taxpayer to appeal his individual assessment. The court noted that a federal class action would avoid the expense, inconvenience, and inefficiency of separate actions at law in the state court. In *Owens v. Housing Authority of City of Stamford*, 394 F. Supp. 1267, 1271 (D. Conn. 1975), the court found that *Younger* and *Huffman* did not bar a federal class action attack on public housing eviction procedures since, *inter alia*, the federal suit would avoid duplicative legal proceedings in each of the housing authorities' state eviction cases.

Finally, federal injunctive relief in the instant case does not reflect negatively upon the state court's ability to enforce constitutional principles, since the state court could not have afforded the plaintiff or the plaintiff class complete relief in the collection suit pending before it.

**2. Plaintiffs and members of the plaintiff class did not have an adequate remedy in the state courts since any appeal of the constitutional issue would ultimately have become moot.**

Federal deference to the state courts not only presumes that there is a timely opportunity to raise the constitutional issues in the pending state proceeding, but further that any adverse ruling can be appealed through the state appellate network and ultimately to this Court. *See, Huffman* at 605-606, 608-609. *Accord, Lessard v. Schmidt*, 413 F.Supp. 1318 (E.D. Wisc. 1976) *on remand from* 421 U.S. 957 (1975). The opportunity for ultimate review by the Supreme Court is essential for a full and complete hearing on all federal and constitutional issues. Appellate review is also crucial in the instant case since only a decision by the Illinois or United States Supreme Court will have *stare decisis* effect throughout Illinois and thus protect the rights of plaintiffs and the plaintiff class against continuing operation of the Attachment Act. However, because of the cumbersome procedure for appealing attachments in Illinois, the constitutional issue is virtually certain to become moot before appellate review is completed.

In Illinois, rulings on matters relating to attachment must be appealed pursuant to Illinois Supreme Court Rule 304(a), Ill.Rev.Stat. ch. 110A, §304(a). *Smith v.*



*Hodge*, 13 Ill.2d 197, 148 N.E. 2d 793 (1958). *Accord, American Mrtg. Corp. v. First Nat'l Mrtg. Co.*, 345 F.2d 527, (7th Cir. 1965). Rule 304(a) provides *inter alia* that final judgments as to fewer than all the claims in a lawsuit can only be appealed if the trial court makes an express written finding that there is no just reason for delaying appeal. Thus, if the court refused to make such a finding, any ruling on the constitutionality of the attachment procedure must await final judgment on the merits of the creditor's claim.[19] At this point however the constitutional issue becomes moot, for if the debtor prevails on the merits the attachment is dissolved, while if the creditor prevails the attached property becomes available for execution[20] (§34 of the Act, A. 46). Since there is normally no liability for good faith use of a statute not yet found to be unconstitutional, there is no remaining damage issue to save the case from mootness. *See, Tucker v. Maher*, 497 F.2d 1309 (2nd Cir. 1974).[21]

If the Court does make the requisite finding under Rule 304(a), the order is appealable as a final, not an interlocutory, judgment. There is thus no provision for a stay of the proceedings on the creditor's claim and the appeal would not follow an expedited briefing schedule as in the case of an interlocutory appeal.

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[19]A finding of appealability under Rule 304(a) is purely discretionary and there is no provision for review of an abuse of discretion when a finding is refused. *E.M.S. Co. v. Brandt*, 103 Ill. App.2d 445, 743 N.E.2d 695 (1968).

[20]An appeal bond would only stay execution if the debtor appealed from the judgment against him on the underlying claim.

[21]State law issues regarding proper use of attachment procedures would not be mooted since the Act provides damages for wrongful attachment.

*Compare*, Illinois Supreme Court Rules 304(a), 326 and 343 *with* Rules 307 and 308. Consequently the merits of the underlying claim would ordinarily be resolved and the constitutional issue mooted before that issue was decided by the appellate court, and certainly before the case reached the Illinois or United States Supreme Court.[22]

Given the right combination of circumstances, it is possible that the constitutional issue might eventually reach the higher appellate courts. However, such a result is highly unlikely in light of existing Illinois case law. This Court has previously pointed out that the Tax Injunction Act[23] will not deprive a federal court of jurisdiction over a federal claim to enjoin state tax procedures if the availability of an adequate state remedy is uncertain. *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951); *Township of Hillsborough v. Cromwell*, 326 U.S. 620 (1946). *Accord, Garrett v. Bamford*, 538 F.2d 63, 67 (3rd Cir. 1976). The uncertainty of a complete, swift, and adequate remedy in the instant case should similarly justify federal court action to stop an immediate and

[22]In *Mitchell v. W. T. Grant Co.*, 417 U.S. 600 (1974) and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), where constitutional attacks on prejudgment property seizures reached this Court via the state appellate process, there were immediate interlocutory appeals of the constitutional issues with a stay of proceedings on the underlying claim. For *Mitchell, see*, La. Code Civ. Proc. Ann. Art. 2201, form 1495. For *North Georgia, see*, 231 Ga. 260, 201 S.E.2d 321 (1973); Ga. Code Ann. §6-701(3) and §24-3636.

[23]28 U.S.C. §1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state."



continuing deprivation of property under a patently unconstitutional statute.

In summary, then, the Illinois courts did not provide the necessary predicate for a *Younger* dismissal–"the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Huffman* at 594. By raising the constitutional issue in the pending state court suit the plaintiffs could not have prevented future unconstitutional deprivation of their property, nor would the other members of the plaintiff class be protected against such deprivations. Class injunctive relief against the defendant classes of state officials could only be obtained, if at all, by filing a separate suit in state court, not by raising the federal issue as a *defense* to the appellants' money claim. The remote possibility of an eventual appeal to the United States Supreme Court certainly does not satisfy the requirement of a *timely* hearing, especially where plaintiffs and the plaintiff class will continue to be subject to wrongful attachments. Thus, federal injunctive relief was justified in the instant case to fully protect the federal rights of plaintiffs and the plaintiff class.

### D. The district court did not enjoin any pending state court proceedings but only the summary extrajudicial process of prejudgment attachment to which the members of the plaintiff class had been and would be subjected.

The named plaintiffs did not ask the district court to enjoin prosecution of the state court collection suit against them. They only asked for equitable relief

against the summary extrajudicial seizure of their property and that of the plaintiff class which had been, and would continue to be, effectuated without notice and without any judicial participation. Thus, the relief sought would in no way interfere with the state court proceedings, but instead was directed solely at the extrajudicial procedures authorized by the Illinois Attachment Act.[24] *Younger* and *Huffman* are, therefore, no bar to the instant case.

This conclusion is supported by three decisions of this court: *Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Gerstein v. Pugh*, 420 U.S. 103 (1975). In *Lynch* this Court considered whether a Connecticut prejudgment garnishment was a proceeding in a state court within the meaning of the federal Anti-Injunction Act, 28 U.S.C. §2283. The Court noted that garnishment is instituted without judicial order. The creditor or his attorney merely inserts the appropriate wording in his writ which is then executed by the sheriff. The levy of garnishment may occur prior to the commencement of the creditor's suit. The garnishment is distinct from and independent of the suit on the underlying claim. This entire procedure is carried out and maintained without the participation of the state courts. Thus, this Court concluded that Connecticut

[24] Appellants' presentation of the issues on appeal distorts the real nature of plaintiffs' federal claim. (Appellants' Br. 2). Plaintiffs did not ask the district court to enjoin the appellants from prosecuting any proceeding against them in the Illinois courts. Plaintiffs merely requested that their property which has been attached without due procedural safeguards be returned to them and that all such attachments throughout the state be enjoined. Appellants were never enjoined from proceeding with the merits of their claim in state court.



prejudgment garnishment is an extrajudicial proceeding and an injunction against its maintenance would not be barred by §2283. *Id.* at 556.

The Illinois attachment procedure is virtually identical to Connecticut prejudgment garnishment. Attachment is initiated by a creditor or his attorney by filling in the blanks on a preprinted form and filing it in the clerk's office. The clerk of the court performs the ministerial act of stamping the papers and assigning a docket number.[25] The writ of attachment is then placed with a deputy sheriff who carries out the directions of the creditor with no judicial supervision or control. When, as in this case, property in the hands of a garnishee is attached, the attachment is effectuated before the debtor is served with process. The property itself is secured either in the hands of the garnishee or is seized and held by the sheriff, not under any court order, but as an agent of the creditor. *See, Lynch v. Household Finance Corp., supra* at 554-555. The attachment remains distinct from and independent of the suit on the underlying claim.[26] Attachment, then,

[25] While the clerk is technically an officer of the court, his duties are purely ministerial and he has no authority to exercise judicial powers. *People ex rel. Pardridge v. Windes*, 275 Ill. 108, 113 N.E. 949 (1916). *See, generally*, Ill. Rev. Stat. ch. 25, §§1 *et seq.*

[26] In *Smith v. Hodge*, 13 Ill. 2d 197, 148 N.E.2d 793 (1958), the Illinois Supreme Court held that any final order concerning an attachment could only be appealed pursuant to Illinois Supreme Court Rule 304 (formerly 50(2) of the Civil Practice Act) which specifies the procedure for appealing final judgments as to fewer than all the claims in a lawsuit. Thus the Illinois Supreme Court has indicated that like spearate counts in a complaint, attachment and the underlying claims are separate and distinct.

like Connecticut prejudgment garnishment is levied and maintained without the participation of the state courts and thus can be said to be an extrajudicial proceeding.

While *Lynch* concerned the applicability of the Anti-Injunction Act to prejudgment creditor remedies, this Court indicated in *Fuentes v. Shevin, supra,* that *Younger* would also not be a bar to an injunction against a similar extrajudicial property seizure. In that case Mrs. Fuentes' goods were replevied by a deputy sheriff pursuant to the Florida Replevin Act. The writ of replevin was issued by a court clerk without judicial order or approval and without prior notice to the plaintiff and an opportunity for a hearing. While Fuentes could have raised her constitutional attack on the Florida Act in the ensuing state court suit brought by the creditor, she chose to file a §1983 action in federal court seeking a declaration that the Act violated her due process rights and an injunction against its continued enforcement.[27] This Court did not find *Younger* to be a bar to reaching the merits of the plaintiff's claim and went on to find the Florida (and Pennsylvania) Replevin Acts to be unconstitutional. The Court noted that:

> Neither Mrs. Fuentes nor the appellants in No. 5138 sought an injunction against any pending or future proceeding as such. *Compare, Younger v. Harris*, 401 U.S. 37. Rather they challenged only the *summary extrajudicial process of prejudgment seizure of property* to which they had already been subjected. *Id.* at 71 n.3 (emphasis added).

Likewise, the plaintiffs in this case did not seek any declaratory or injunctive relief against the pending state

[27]The sequence of events in *Fuentes* virtually parallels the case at bar.



court collection suit, but only challenged the "summary extrajudicial process" of prejudgment attachment.

*Gerstein v. Pugh, supra,* concerned the constitutionality of a Florida procedure whereby prosecutors charged all non-capital offenses by information without a prior preliminary hearing or other judicial proceeding. The only opportunity to challenge the probable cause for detention prior to trial was by a preliminary hearing after thirty days or at arraignment which was often delayed for over a month. *Id.* at 106. As a result a person could be detained for a substantial period of time solely upon the ex parte decision of a prosecutor. Two persons arrested and charged under this procedure filed a class action in federal district court pursuant to 42 U.S.C. §1983 claiming a constitutional right to a probable cause hearing prior to extended detention and requesting declaratory and injunctive relief. The federal plaintiffs presumably could have raised their federal claim in a motion before the state court. Before reaching its decision on the merits this Court agreed with the district court that the federal claim was not barred by *Younger*. The Court reasoned as follows:

> The injunction was not directed at the state prosecution as such, but only at the legality of pretrial detention without a judicial hearing, a issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits. *Id.* at 108 n.9.

The Court then found the Florida procedures to be constitutionally deficient since there were no judicial determinations of probable cause for an extended restraint of liberty after arrest.[28]

[28]The same result was reached in *Conover v. Montemuro*, 417 F.2d 1073, 1082 (3rd Cir. 1972), *cited with approval in Gerstein* at 108 n.9.

While the instant case concerns prejudgment detention of property rather than pre-trial restraint of personal liberty, it is clearly analogous to *Gerstein*. Under the Attachment Act seizure of property is initiated upon the ex parte decision of the creditor without any judicial control or supervision. There is no requirement for a post-seizure hearing before a judge to determine whether the seizure was justified. While the debtor may request a hearing on the attachment he has no absolute right to an immediate post-seizure hearing prior to the return date, and in the instant case that hearing was delayed for an additional thirty days. The legality of the attachment itself cannot be raised in defense of the creditor's underlying claim. As in *Gerstein*, the federal injunction was not directed at the state court proceedings as such "but only at the legality of pretrial detention without a hearing." *Id.*

The nature of the relief granted by the district court in *Lynch, Fuentes, Gerstein* and the present case stands in stark contrast to the federal injunctions vacated by this court in *Younger* and *Huffman*. In *Younger* the district court enjoined the district attorney from further prosecution of the pending criminal action. 401 U.S. at 40. In *Huffman* the district court enjoined execution of a state court judgment that had already been entered on the merits of the state's claim. 420 U.S. at 599.[29] In the present case the district court did not "annul the results of a state trial," *Huffman* at 609, nor did it prevent the parties or the court from proceeding with

[29]In *Sosna v. Iowa*, where this court raised *sua sponte* the *Younger* issue but allowed the parties to waive it, the appellant had sought federal relief after an adverse ruling by the state trial court on the merits of her claim. 419 U.S. 393, 396 n.3 (1975).



the trial on the appellants' money claim. Indeed, as in *Lynch, Fuentes*, and *Gerstein*, the state claim and the federal claim are mutually exclusive and the trial of the former can proceed totally unencumbered by any resolution of the latter.[30]

Any claim of federal interference with the state proceedings must be viewed in light of the actual response of the appellants and the state court to the federal suit. The federal court never enjoined the appellants or the state court from proceeding with the state trial. Appellants were always free to proceed with their civil claim which could have been resolved long before the federal injunction was issued. Instead, appellants voluntarily chose to stay their state suit pending resolution of the federal litigation. Furthermore, appellants ultimately dismissed their state claim although nothing in the federal court order required them to do so.[31] Thus the appellants' claim that the district court's injunction was an "embarrassment" to state executive functions (Appellants' Br. 10) and that it cut short the state proceedings (Appellants' Br. 20)

[30]This factor distinguishes the present case from *Perez v. Ledesma*, 401 U.S. 82 (1971) where this Court found that the suppression of evidence in a pending state criminal prosecution by a federal court is as disruptive of the state criminal process as an injunction against the entire proceedings and therefore is barred by *Younger*. In the instant case the federal court did not rule on any issue which could have been raised as a defense to the money claim and the federal injunction would have had no effect whatsoever on the conduct of the state litigation. This factor, among others, also distinguishes this case from *Cousins v. Wigoda*, 463 F.2d 603 (7th Cir.) *application for a stay denied*, 409 U.S. 1201 (1972).

[31]Even though the federal court ordered a release of the attached property, under the Attachment Act the suit could have proceeded as if commenced by summons (§27). (A. 44.)

cannot be taken seriously in light of the appellants' own failure to press their state suit to its conclusion.

The state court's own perception of the federal suit must also be taken into account when determining whether its interest in the pending litigation had been respected. The state court was surely aware of the federal suit and yet it allowed appellants to stay the state suit pending the resolution of the federal litigation. Had the state court viewed the federal suit as an interference with its legitimate functions or as a negative reflection on its abilities, it surely could have required the parties to proceed with the state suit. Yet, without any federal stay of the state suit, the state court deferred to the federal court and postponed any litigation of the state claim until after the federal court had resolved the federal issues.

Finally, the federal suit did not result in a duplication of legal proceedings. *See, Huffman* at 602-604. There was never any judicial participation of any kind in the attachment. Thus, if the debtor chooses to raise the constitutionality of the attachment in federal rather than state court, he is not duplicating any pending or completed proceedings. The suit on the merits will proceed to judgment in the state court regardless of whether the attachment is released by a federal court or by the state court itself.

In summary, owing to the extrajudicial nature of prejudgment attachment in Illinois, the federal district court was able to vindicate the constitutional rights of the plaintiff class while fully respecting the interest of the state courts and the requirements of our federal system.



**E. The traditional policy against federal interference with state criminal prosecutions does not bar federal relief against prejudgment attachment in Illinois which is neither a criminal proceeding nor in any way related to the state's criminal laws.**

*Younger* rested, in part, upon "the traditional reluctance of courts of equity, even in a unitary system, to interfere with a criminal prosecution." *Huffman*, 420 U.S. at 604. In *Huffman* the Court found that this element of *Younger* was equally applicable to a state public nuisance proceeding which was "more akin to a criminal prosecution than are most civil cases." *Id.* at 604. This Court characterized the state proceeding as one "in aid of and closely related to criminal statutes which prohibit dissemination of obscene materials" and found that the district court's injunction "disrupted (the) state's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws." *Id.*

This element of *Younger*, which was the Court's primary basis for vacating the district court injunction in *Huffman*, is not present in the instant case. Prejudgment attachment in Illinois is simply a general creditor's remedy designed to facilitate collection of a possible judgment on the creditor's alleged claim. Attachment can be initiated by any party, public or private, for any cause of action sounding in contract or tort. As it is written the statute is not in aid of or closely related to any criminal statute nor are the interests embodied in the Attachment Act in any way related to those interests underlying Illinois' criminal laws.

In applying *Younger* principles to state civil proceedings numerous lower federal courts have drawn a similar distinction between "true" civil proceedings and those which are integrally related to a state's enforcement of its criminal laws. The Fifth Circuit has consistently applied *Younger* principles only in the latter case. *See, Palaio v. McAuliffe*, 466 F.2d 1230, 1232-1233 (5th Cir. 1972); *Duke v. Texas*, 477 F.2d 244, 250-251 (5th Cir. 1973); *Polk v. State Bar of Texas*, 480 F.2d 998 (5th Cir. 1973). The district court for the Northern District of Texas followed the lead of its court of appeals in a case remanded to it by this Court for reconsideration in light of *Younger*, finding that *Younger* did not prevent it from enjoining state condemnation proceedings. *Joiner v. City of Dallas*, 380 F.Supp. 754 (N.D. Tex.), *aff'd mem.*, 419 U.S. 1042, *rehearing denied*, 419 U.S. 1132 (1974). Other federal courts have recently refused to apply *Younger* and *Huffman* to strictly civil proceedings. *See, Vail v. Quinlan*, 406 F.Supp. 951 (S.D. N.Y. 1976), *prob. juris. noted* ____ U.S. ____ (No. 75-1397, June 21, 1976) (civil contempt); *Lessard v. Schmidt*, 413 F.Supp. 1318 (E.D. Wisc. 1976) *on remand for further reconsideration in light of Huffman from*, 421 U.S. 957 (1975) (civil commitment); *Doe v. Maher*, 414 F.Supp. 1368 (D. Conn. 1976) *on remand for further consideration in light of Younger and Huffman from*, 422 U.S. 391 (1976) (civil contempt); *United States General, Inc. v. Arndt*, ____ F.Supp. ____ (No. 75-C-204, E.D. Wisc. August 4, 1976) (Wisconsin attachment statute).

In *United States General, Inc. v. Arndt, supra,* a three-judge district court found that *Huffman* did not prevent it from examining the constitutionality of a



Wisconsin prejudgment attachment statute which resembles the Illinois procedure in many respects. The court reasoned as follows:

> The Wisconsin attachment statute presently before us is designed to aid private creditors and potential creditors in the ultimate collection of their alleged debts. No section of the Wisconsin Criminal Code is directly implicated or paralleled by the attachment device. Thus, this Wisconsin statute is undoubtedly more purely civil and private than the Ohio nuisance proceeding which the Court in *Huffman* effectively characterized as quasi-criminal. Our intervention here does not contain the element of federal interference with the State's legitimate interest in regulating the primary conduct of its citizens which concerned the Huffman court. *Id.*, slip opinion at 7-8.

This sound reasoning is equally applicable to the instant case.

In spite of the above considerations appellants contend that *Huffman* is a bar to the instant action since the State of Illinois was the plaintiff in the pending attachment suit and the proceeding was in aid of a statute which authorizes civil and criminal actions in public assistance fraud cases. (Appellants' Br. 13-14.) This contention leads to the unwarranted conclusion that the nature of the interests embodied in a state statute can vary according to the party who utilizes its provisions. While in *Huffman* it was significant that the state was a party to the nuisance proceedings, as the court below recognized, the Ohio statute gave the state an exclusive right to carry out its provisions. 405 F.Supp. at 760. The appellants, on the other hand, proceeded under a general civil statute which allows any "creditor" to have an attachment for any money claim.

The purpose of the pendant state collection suit is also irrelevant here since the federal court did not interfere with that proceeding. The appellants have always been free to proceed with their civil claim or to file criminal charges if they so desire.

Furthermore, it must be kept in mind that the district court certified a plaintiffs' class consisting of "all persons who now have or may have their property attached upon a creditor's allegation of fraudulent conduct pursuant to the Illinois Attachment Act, Ill.Rev.Stat., ch. 11, §1, Parts sixth through ninth." Clearly there are numerous persons in this class who have been subjected to attachments by private creditors for ordinary civil debts. The existence of this plaintiff class underscores the general civil nature of the attachment proceeding.

**F. Because the Illinois Attachment Act is flagrantly and patently unconstitutional, the federal court properly enjoined its execution.**

Federal court interference is allowed, even with state criminal prosecutions, where the challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Huffman* at 611; *Younger* at 54-55. The court below concluded that the instant case falls within this exception to the normal rule against federal non-interference. 405 F.Supp. at 760. This conclusion was reached after careful consideration of this Court's recent decisions on summary creditor remedies. *Id.* at



760-765. The district court found that the Act fails to provide either prior notice and hearing or other procedural safeguards which this Court has now made clear must be present to protect debtors from hasty and wrongful seizure of their property.

In *Huffman* this Court expressed the view that the Ohio public nuisance statute could not be characterized as flagrantly and patently unconstitutional since the Supreme Court of Ohio had subsequently construed that statute in a manner which avoided the constitutional difficulties which had concerned the district court.[32] 402 U.S. at 611-612. In contrast, the Attachment Act is incapable of any construction which would eliminate the constitutional questions raised herein. As will be seen in Section III, *infra*, appellants' claim that the Act is capable of judicial narrowing is totally without merit. (Appellants' Br. 20, 24.) The Attachment Act is constitutionally infirm in "whatever manner and against whomever an effort might be made to apply it." It is so broadly drawn that it could not be interpreted to be limited to those facts or situations which might pass constitutional muster under a more narrowly circumscribed statute. This factor along with the others set forth above clearly justified federal injunctive relief in the instant case.

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[32]The fact that the constitutional issue in *Huffman* involved a statute which was capable of judicial narrowing was an additional reason that this Court felt that the state appellate courts should have been given the opportunity to rule on that issue. 420 U.S. at 609.

### G. Conclusion.

In conclusion, the strong federal interest of providing a forum for the vindication of federal rights under §1983 was realized in this case without any interference with state judicial functions. The plaintiffs and the members of the plaintiff class raised a uniquely federal claim which was not cognizable in the pending state proceeding. The relief was necessary to prevent great and immediate irreparable injury from the operation of a patently unconstitutional statute. The federal injunction did not interfere with the state civil collection suit, nor did it disrupt the state's efforts to enforce its criminal laws. The federal litigation did not duplicate state legal proceedings nor did it in any way reflect negatively on the state court's ability to enforce constitutional principles. In light of these considerations the principles of equity, comity, and federalism were fully respected, and in fact enhanced, by the decision of the district court to hear and decide the constitutional claims presented in this case.

## III.

## THE ILLINOIS ATTACHMENT ACT IS PATENTLY VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In a series of cases this Court has set forth the due process requirements for various summary creditor remedies. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974);



*North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). In *Mitchell*, this Court eschewed any strict rule as to the requirements of due process in every instance and approved a Louisiana sequestration statute which struck a balance between the conflicting interests of the buyer and seller of secured household goods. 416 U.S. at 610. The Louisiana statute permitted a secured creditor to obtain possession of the disputed goods prior to a full adversary hearing only by presenting to a judge a petition and affidavit setting forth in factual detail the grounds for the sequestration and by filing a bond to indemnify the buyer for a wrongful seizure. *Id.* at 605-606. The buyer could obtain release of the property by filing his own bond or by immediately moving for a post-seizure hearing at which the creditor would have to prove the facts alleged in his affidavit. *Id.* at 607.

In *North Georgia*, this Court made it clear that the procedural safeguards which saved the Louisiana sequestration statute from being unconstitutional were not to be limited to the facts of *Mitchell*, but were equally applicable to a Georgia statute which authorized a pre-hearing attachment of an alleged debtor's property. The Court struck down the Georgia procedure since it neither provided a pre-seizure hearing nor did it contain two of the important procedural safeguards present in *Mitchell*, issuance of the writ by a judge upon a factually supported affidavit and the opportunity for an immediate post-seizure hearing, 419 U.S. at 606-607. Decisions of the lower federal courts, both prior to and after *North Georgia*, have generally utilized the same reasoning, requiring that state statutes authorizing pre-hearing property seizures provide, at a bare minimum, all the procedural safeguards set forth in

*Mitchell*. See, *e.g.*, *United States General v. Arndt*, F.Supp. (No. 75-C-204, E.D. Wisc., August 4, 1976); *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123 (3rd Cir., 1976); *Guzman v. Western State Bank of Devils Lake*, 516 F.2d 125 (8th Cir., 1975); *Bunton v. First Nat'l. Bank of Tampa*, 393 F.Supp. 793 (M.D. Fla., 1975); *Douglass Research and Chemical, Inc. v. Solomon*, 388 F.Supp. 433 (E.D. Mich., 1975); *Sugar v. Curtis Circulation Co.*, 383 F.Supp. 643 (S.D.N.Y., 1974), *rev'd. on other grounds, sub nom. Carey v. Sugar*, ____, U.S.____, 47 L.Ed.2d 587 (1976); *Garcia v. Krausse*, 380 F.Supp. 1254 (S.D.Tex., 1974) *rev'd. on other grounds*, 534 F.2d 609 (5th Cir., 1976). *See, generally, Pearson, Due Process and the Debtor: the Impact of Mitchell v. W. T. Grant*, 29 Okla. L.R. 277 (1976).

After reviewing the above decisions of this Court and examining the provisions of the Illinois Attachment Act, the court below found that the Act provided neither a pre-seizure hearing, nor the alternative safeguards of *Mitchell*. 405 F.Supp. at 762. Specifically, the Court found the Illinois Act lacking three crucial safeguards which were present in the Louisiana sequestration statute upheld in *Mitchell*. First, the Illinois Act does not require the creditor to set out specific facts in his affidavit which would entitle him to relief, but authorizes a writ to issue upon conclusory allegations in verbatim statutory language coupled with certain procedural information. Second, a creditor need not present a factual affidavit to a judge for determination of whether a writ should issue, but instead a writ will automatically issue from the clerk of the court who has no authority to determine the factual sufficiency of the affidavit. Third, the Act does not provide for an immediate post-seizure hearing, but



only a hearing on application by the debtor at some uncertain time in the future to be set at the convenience of the court. Thus, the court concluded that the Illinois Act is "on its face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution." *Id.*

Although appellants apparently agree with the district court's findings as to at least two of the defects in the Act–issuance of the writ by a clerk and lack of an immediate post-seizure hearing (Appellants' Br. 30-31)–they nevertheless contend that the district court did not properly apply *Mitchell* to the instant case and that the Illinois procedures closely parallel those of the Louisiana sequestration statute. (Appellants' Br. 24-25.) As to the first contention, it is clear that the district court's interpretation of *Mitchell* is in line with this Court's application of that case in *North Georgia* and with the numerous other federal courts cited above. As to the second contention, a comparison of the Louisiana statute with the Illinois Act shows that appellants' argument is without merit.

First, it should be kept in mind that the Louisiana statute authorized sequestration of specific property in which the creditor claimed "the ownership or right to possession . . . or a mortgage, lien, or privilege thereon," *Mitchell, supra* at 623. In *Mitchell*, it was undisputed that the creditor had a vendor's lien on the sequestered property, and that he was entitled to immediate possession if the buyer defaulted on his installment contract. *Id.* at 603. In contrast, the Illinois attachment creditor need not have nor allege any current lien, mortgage, or other legally cognizable interest in the property subject to attachment. Instead, the creditor has a virtually unlimited power to initiate a seizure by

the sheriff of any and all goods of an alleged debtor to be held for satisfaction of a possible future judgment. While the existence of a secured interest in the disputed property may not be a constitutional requirement for dispensing with a pre-seizure hearing, the absence of any present legal interest in attached property must be taken into account when determining whether there are adequate alternative safeguards to protect a debtor from a wrongful deprivation of his unencumbered property rights. Indeed, this Court has pointed out that a secured creditor's own interest in avoiding an interruption of payments on his installment contract contributes to minimize the risk that he will initiate a wrongful sequestration. *Id.* at 610. There is no similar safeguard in the present situation where the attachment creditor's interest is served by immediately seizing as much of the debtor's property as he believes is necessary to satisfy his alleged claim.[33] Under such circumstances the procedural safeguards which protect an installment buyer of household goods from an unwarranted sequestration must at a bare minimum be present to protect an attachment debtor from an unlimited seizure of property in which he has an undisputed possessory right.

Appellants assert that the Illinois attachment creditor, like the seller in *Mitchell*, must file an affidavit which supports the grounds for attachment with specific facts (Appellants' Br. 28). The facts of the

[33]The value of the property which can be attached is not limited by the Act. Under §6 the creditor may direct the sheriff to attach specific property which need not be limited in value to the amount of the claim. The bond provision does not protect the debtor against an excessive attachment since the creditor need only file a bond in twice the amount of the claim.



instant case belie appellants' contention. The appellants obtained their attachment by filing an affidavit on a preprinted form supplied by the clerk of the circuit court which set forth the grounds for attachment in verbatim statutory language (A. 14). The form of the affidavit utilized is specifically authorized by the Act (§2A, A. 30). The appellants merely filled in the proper blank spaces selecting the ground that the plaintiffs "within two years preceding the filing of this affidavit fraudulently concealed or disposed of property so as to hinder or delay their creditors" (A. 17-18). Neither in the affidavit nor the complaint filed therewith did the appellants set forth the specific factual elements of fraud which must be pleaded in Illinois. *See, Tate v. Jackson*, 22 Ill. App.2d 471, 161 N.E.2d 156 (1959); *Attwood Vacuum Machine Co. v. Continental Casualty Co.*, 107 Ill.App.2d 248, 246 N.E.2d 882 (1969).[34] Lacking specifically pleaded facts a judicial officer would have no basis on which to evaluate whether a writ should issue but could only determine that procedural requirements were met. Factual allegations are also important, especially in a complex claim such as fraud, to apprise the debtor of the specific facts he will have to rebut at any subsequent post-seizure hearing. In the instant case an effective defense could only have been carried out after discovery, further prolonging the period of detention without a hearing.

[34]Even if a complaint is properly pleaded it does not satisfy the requirement of factual support for issuance of the writ since it need not be filed until after the writ has been issued (§25). (A. 43.) In contrast the creditor in *Mitchell* was required to set forth his factual grounds in a verified petition or accompanying affidavit before the writ would issue. *Mitchell, supra,* at 422.

Appellants concede that in contract actions such as the present case, the writ is issued by a clerk without judicial participation but attempts to minimize this constitutional defect by misconstruing the reasoning in *Mitchell* (Appellants' Br. 30). In *Mitchell*, the issue of possession *pendente lite* turned on the existence of the debt, the lien, and the delinquency. This Court reasoned that "these are ordinarily uncomplicated matters that lend themselves to documentary proof" and thus initial seizure on sworn ex parte documents was appropriate. *Id.* at 609. However, these documents were examined by a judge who was required to determine whether the sworn statements constituted adequate grounds for the sequestration. *Id.* at 616 n.12. Contrary to appellants' contention that in such cases an appearance before a judge would be a mere formality (Appellants' Br. 30), the role of the judge in *Mitchell* was considered crucial. As the Court pointed out, "Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for *judicial* control of the process from beginning to end." (Emphasis added.) *Id.* at 616. Furthermore, not all contract actions concern such uncomplicated matters as that involved in *Mitchell*. Fraud, for example, is made up of numerous subjective elements such as intent and scienter which are not amenable to documentary proof. *See, Mitchell, supra* at 617. In such a complex case, judicial scrutiny of the



affidavit is especially crucial in an ex parte proceeding.[35]

Appellants rightly point out that in tort actions the creditor must be examined by a judge concerning his cause of action before a writ of attachment may issue. (Appellants' Br. 29.) However, as noted by the district court, this provision is "limited only to the question of potential damages and determination of the limit on the amount of property to be attached. The judge is not required to evaluate the legal sufficiency of sworn facts as was the case in *Mitchell*." 405 F.Supp. at 762. This interpretation is supported by the clear wording of the Act. The judge examines the creditor concerning the "cause of action" not the grounds for attachment and thereupon endorses upon the affidavit "the amount of damages for which the writ shall issue." Thereafter the clerk, not the judge, issues the writ upon filing of the

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[35] Mr. Justice Powell has suggested that due process does not require a writ of garnishment to be issued by a judicial officer as long as the factual basis of the need for the remedy be established before a neutral officer such as a court clerk. *North Georgia* at 611 n.3. Only one lower federal court has approved a summary creditor procedure where the writ is issued by a clerk, but in that case the clerk had certain judicial powers and could evaluate whether the factual allegations in the affidavit justify the summary remedy. *Hutchison v. Bank of North Carolina*, 392 F.Supp. 888 (N.D. N.C., 1975). The clerk in Illinois, however, is only a ministerial functionary (see *infra* n.17) and he has no power to evaluate the legal sufficiency of the creditor's affidavit. In fact, the clerks in the circuit court of Cook County rarely examine the content of papers filed with them and it is up to opposing counsel to raise any deficiencies therein by motion. In complicated matters such as fraud, a clerk would certainly be unable to determine whether the proper factual elements have been pleaded.

properly endorsed affidavit.[36] In any case the present attachment was on a contract action and prior judicial endorsement of damages was not obtained.[37]

Finally, and most significantly, the Attachment Act contains no express provision for an immediate post-seizure hearing. Since the creditor can set the return date ten to sixty days from the issuance of the writ, the first scheduled hearing at which the debtor can attack the attachment can occur anywhere within a

[36]The district court's interpretation is also supported by the history of this provision. The previous Act of 1874 provided simply that "a creditor may have an attachment against the property of his debtor." Ill.Rev.Stat. (1874) ch. 11, §1. The courts generally interpreted this provision to be limited to contract actions for liquidated damages. *See, 3 Illinois Law and Practice 566.* The Act was amended in 1935 and specifically authorized attachment for tort actions and for unliquidated damages. Ill. laws (1935) at 210. The provision for prior judicial endorsement in tort actions was added to §2 at this time apparently to resolve the problem of how to set the amount of bond where there was no fixed liquidated damage claim. *See*, Note, *Amendment to Illinois Attachment Act*, 14 *Chi.Kent L.Rev*. 64, 65 (1935). There is nothing in the history of the Act or case law to indicate that prior judicial evaluation of the legal sufficiency of the affidavit be made in tort actions as opposed to contract actions, nor does logic suggest such a distinction.

[37]Appellants raise for the first time the possibility that their claim sounds in tort and therefore the writ might have been quashed in state court since the affidavit had not been endorsed by a judge. (A. 30 n.5) Appellants fail to note, however, that §28 of the Act provides that no writ of attachment shall be quashed nor property taken thereto returned because of an insufficiency in the original affidavit if the creditor files a proper affidavit within such time and manner as the court directs. (A. 44.) Appellants could have simply asked for leave to file an amended affidavit, signed by the judge, and the attachment would have remained intact.



fifty day period depending upon which date the creditor chooses. Furthermore, the Act does not require a hearing on the return date and thus the debtor's first opportunity to move for dissolution of the attachment may be well after that date. In the instant case the first hearing date was set for thirty days after the attachment and forty-two days after service of the writ.

Appellants concede that the first opportunity for a post-seizure hearing may not occur until sixty days after the attachment. (Appellants' Br. 31.) Appellants contend however that a hearing within sixty days is reasonable, given the requirements of modern litigation. While sixty days might be considered early relative to the time civil litigants must normally wait for a hearing, it certainly does not satisfy the requirement of an *immediate* hearing which cuts to a *bare minimum* the length of an ex parte seizure. *Mitchell, supra* at 610. And certainly such a lengthy deprivation cannot be considered reasonable in light of the virtually unlimited power of the creditor to seize any and all goods of a debtor. Finally, contrary to appellants' contention (Appellants' Br. 31) there is no provision in the Attachment Act or in the Illinois Civil Procedure Act which would allow the debtor to advance the hearing date or move to quash prior to the return date. *See, Hecht v. Feldman*, 153 Ill. 390, 398 39 N.E. 121 (1894). The date of an ultimate hearing on the attachment issue is totally up to the discretion of the court. Under these circumstances an *express* provision for an *immediate* hearing is necessary for the proper protection of the debtor's interests.

In sum, the Illinois Attachment Act authorizes a creditor with any kind of money claim to attach another's property in which the creditor has no legally

cognizable interest, merely by filing an affidavit containing conclusory allegations with a ministerial court officer. Through this procedure a debtor can be deprived of his property for at least sixty days or possibly for a longer period where, as in Cook County, a hearing is not granted on the return date. The possible impact on the debtor of such deprivation can be seen from the affidavit of the plaintiffs in the instant case. (A. 24-25.) *See* discussion *supra* at 21. While the attachment did not interrupt the plaintiffs' basic source of income as in *Sniadach*, they were denied access to savings from their wages at a time when they most needed them. Under these circumstances a creditor has great leverage for favorable settlement of his claim, especially in the case of a low-income debtor who may be unable to obtain a bond for the release of his property.

There can be no question, then, that in light of the contingent nature of the creditor's interest in the property, and most importantly, the lack of important procedural safeguards to protect the debtor against a wrongful and lengthy seizure of his property, the Illinois Attachment Act must be seen as patently unconstitutional.



## CONCLUSION

For the foregoing reasons appellees Juan and Maria Hernandez respectfully pray that the judgment of the district court be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

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No. 75-1407

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JAMES TRAINOR, etc., et al.,

Appellants,

v.

JUAN HERNANDEZ, et al., etc.,

Appellees.

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On Appeal From The United States District Court For The Northern District of Illinois, Eastern Division

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# BRIEF OF APPELLEES JUAN HERNANDEZ AND MARIA HERNANDEZ

## ERRATA

Page vi, United States General, Inc. v. Arndt, 417 F. Supp. 1300 (E.D. Wisc., 1976).... 21,44,50

Page 11, second paragraph, line 5,
...prejudgment attachment in Illinois is

Page 14, second paragraph, line 7,
as in the instant case,...

Page 20, Note 8, line 4,
at 15.

Page 23, first paragraph, line 3,
authorized §1983 plaintiff and defendant class actions

Page 45, first paragraph, last line of quotation,
Huffman court. Id. at 1309

Page 55, Note 35, line 11,
only a ministerial functionary (see infra n.25)...

Page 58, first paragraph, line 9,
... See discussion supra at 24.

FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 75-1407**

JAMES TRAINOR, et al.,

*Appellants,*

vs.

JUAN HERNANDEZ, et al.,

*Appellees.*

**On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division**

## REPLY BRIEF AND ARGUMENT OF APPELLANTS JAMES TRAINOR AND VIVIAN O'MALLEY

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IN THE

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OCTOBER TERM, 1975

**No. 75-1407**

JAMES TRAINOR, et al.,

*Appellants,*

vs.

JUAN HERNANDEZ, et al.,

*Appellees.*

**On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division**

## REPLY BRIEF AND ARGUMENT OF APPELLANTS JAMES TRAINOR AND VIVIAN O'MALLEY

### I.

### THE APPEAL OF TRAINOR AND O'MALLEY CANNOT BE AFFECTED BY THIS COURT'S DISPOSITION OF THE APPEAL OF ELROD AND FINLEY.

Appellees state that appellants Finley and Elrod filed a timely notice of appeal but failed to file a jurisdictional statement, thereby subjecting their appeal to dismissal pur-

suant to United States Supreme Court Rule 14(3). They next curiously conclude that if the Court dismisses the appeal of Finley and Elrod, the injunction restraining them and the class they represent from enforcing the Illinois Attachment Act may not be challenged by Trainor and O'Malley even though it is clear that these appellants filed a timely notice of appeal and jurisdictional statement, and had their appeal properly docketed in this Court. The inference drawn by appellees is that even if appellants Trainor and O'Malley "were to prevail on the appeal of the injunction against them, they could still not obtain prejudgment attachments since all clerks and sheriffs are enjoined from issuing and executing writs of attachment." (appellees' brief, pp. 17-18).

It would be extraordinary indeed if the right to a full and complete review were denied to litigants by this Honorable Court where the record readily demonstrates that they have perfected their appeal in a timely fashion because of the action or inaction of another set of litigants. It is manifest that appellants Trainor and O'Malley have no control over the conduct of appellants Finley and Elrod or their attorneys, and no conduct of theirs ought to be imputed to appellants Trainor and O'Mally, nor should any vicarious responsibility be placed upon appellants Trainor and O'Malley for that conduct.[1] It is submitted that appellants Trainor and O'Malley have properly perfected their appeal, and are entitled to any and all relief appropriate to the merits of their cause.

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[1] Appellants Trainor and O'Malley do not intend to imply any error in the conduct of appellants Elrod and Finley, and in fact support their position taken in regard to this matter in point I of their reply brief. It is only submitted that whatever action this Court deems appropriate with regard to their appeal should have no effect upon the appeal of Trainor and O'Malley.



## II.

**THE PRINCIPLES OF YOUNGER v. HARRIS AND HUFFMAN v. PURSUE, LTD. REQUIRE THAT THIS SUIT BE DISMISSED.**

It is plain, beyond doubt, that a federal court injunction restraining a pending state court proceeding is an extraordinary remedy to be exercised only in exceptional circumstances, and not as a matter of course. As a matter of fact, "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions". *Younger* v. *Harris,* 401 U.S. 37, 45, 27 L.Ed.2d 669, 676 (1971).

In *Mitchum* v. *Foster,* 407 U.S. 225, 32 L.Ed.2d 705 (1972) this Court recognized that the Anti-injunction statute (28 U.S.C. §2283) "imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding" unless the injunction is authorized by an Act of Congress, necessary in aid of the federal court's jurisdiction, or necessary to protect or effectuate the federal court's orders. The Anti-injunction statute applies by its literal terms equally to pending state criminal and civil actions. While the Court recognized in *Mitchum* that §1983 is an exception to the Anti-injunction statute as "authorized by an Act of Congress, it, by no means, gave federal district courts *carte blanche* authority to issue injunctions restraining state court proceedings every time a plaintiff files an action under the auspices of §1983. Rather, in concluding as it did, the Court did not "question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding" (407 U.S. at 243, 32 L. Ed.2d at 718); it indicated that these "principles of equity, comity and federalism" were "canvassed at length" in

*Younger* v. *Harris,* 401 U.S. 37, 27 L.Ed.2d 669 (1971), and that they had been "emphasized by this Court many times in the past." 407 U.S. at 243, 32 L.Ed.2d at 718. The matter before the Court was then remanded to the federal district court for consideration of whether an injunction ought to issue to stay a state court proceeding under the circumstances of that case.

Although *Younger* v. *Harris* was decided in the context of a state criminal proceeding, it provides, as the Court said in *Mitchum,* a lengthy canvass of the principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state court proceeding. This Court held in *Younger* that the concept of federalism adopted by the framers of the Constitution "is a system in which there is a sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with legitimate activities of the states." 401 U.S. at 44, 27 L.Ed.2d at 676. The Court found that "in view of the fundamental policy against federal interference with state criminal prosecutions. even irreparable injury is insufficient unless it is 'both great and immediate.'" (401 U.S. at 46, 27 L.Ed.2d at 676), and further stated that the possibility that a statute may be unconstitutional on its face will not justify an injunction against a good faith attempt to enforce it. 401 U.S. at 54, 27 L.Ed.2d at 681.

Mr. Justice Stewart in a concurring opinion indicated that examples of circumstances demonstrating great and immediate irreparable injury "might be shown if the state criminal statute in question were patently and flagrantly unconstitutional on its face, or if there has been bad faith



and harassment—official lawlessness—in a statute's enforcement. 401 U.S. at 56, 27 L.Ed.2d at 682 (citations omitted).

In *Huffman* v. *Pursue Ltd.,* 420 U.S. 592, 43 L.Ed.2d 482 (1975) this Court extended the rationale of *Younger* and its predecessor cases to a pending state civil matter, and held that the district court should have applied *Younger* principles in determining whether to proceed on the merits of the cause presented. In arriving at its conclusion the Court noted that a rule requiring strict observance in these kinds of cases was that no injunction ought to issue against officers of the State except in a case free from doubt and only when necessary to prevent great and immediate irreparable injury (420 U.S. at 603, 43 L.Ed.2d at 492) and reiterated that federal court intervention is proper only where the district court finds that,

> the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' "

420 U.S. at 611, 43 L.Ed.2d at 496

It is respectfully submitted that the present cause, when viewed against the backdrop of the decisions just surveyed, will not support federal intervention by means of an injunction restraining the employment of the Illinois Attachment Act by state officials in aid of a lawful state purpose.

**A.**

**Appellees Failed To Demonstrate Great And Immediate Irreparable Injury.**

It should be noted at the outset that there was no demonstration whatever in the cause before the district court

of irreparable injury, much less great and immediate irreparable injury on behalf of the appellees, which would warrant federal intervention under the principles enunciated by this Court. While appellees make the bare allegation in their complaint that they "have suffered and continue to suffer irreparable injury" (A. 11, paragraph 19 of the complaint) and in an affidavit in support of their motion for a temporary restraining order[2] that they need the money which is the subject of the attachment (A. 25), they make no allegation that the Illinois Attachment Act was employed by state officials in bad faith to harass them or that the Illinois Attachment Act constitutes a flagrant and patent violation of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it.

It is likewise noteworthy that the district court made no finding whatever of irreparable injury in either its final order (A. 65-67) or its memorandum opinion (A. 68-77)—apparently for the reason that none had been demonstrated. The district court likewise made no finding that the Attachment Act was employed by state officials in bad faith to harass appellees or that the Act constituted a patent and flagrant violation of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it in either its final order or its memorandum opinion. The district court only found in its order (A. 65-66, par. 1) and memorandum opinion (A. 77) that the Illinois

[2] It is interesting to note that no temporary restraining order was ever entered because the appellees came to a settlement which resulted in the release of a portion of the money which was attached.



Attachment Act "on its face" was "patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution." As previously indicated such a finding, under the decisions of this Court, is insufficient to justify federal intervention by means of an injunction in a pending state court proceeding. *Younger* v. *Harris,* 401 U.S. 37, 54, 27 L.Ed.2d 669, 681 (1971); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 612, 43 L.Ed.2d 482, 496 (1975).

It is therefore, submitted that the failure of appellees to plead or prove and the failure of the district court to recognize any extraordinary circumstances constituting great and immediate irreparable injury is sufficient reason by itself to reverse the district court's decision.[3]

**B.**

**The State Court Proceedings Afforded Appellees An Effective And Speedy Remedy For Their Federal Claim.**

At the outset it should be recognized that the objections which appellees advance as to the adequacy of their remedy in the state court (appellees' brief, pp. 26-35) would, if embraced by this Court, effectively nullify the holdings of *Younger* and *Huffman.* Those cases are clear in their expression of the recognized exceptions to the doctrine of federal court deference to pending state court proceedings. State court proceedings are not to be interfered with "unless it *plainly appears* that [the defense of the state suit] would not afford adequate protection" (*Younger,* 401 U.S.

[3] Appellees appear to recognize that they have failed to plead or prove great or immediate irreparable injury, in fact, since they argue at page 25 of their brief that "the deprivation of one's constitutionally protected property rights must be seen as irreparable *per se.*"

at 45, 27 L.Ed.2d at 676 (emphasis added))—that is, unless extraordinary circumstances are present. *Younger,* 401 U.S. at 41, 27 L.Ed.2d at 674. The question thus is whether the appellees will suffer great and immediate irreparable harm as a result of the state court proceedings, and not whether appellees can conjure up some imaginary set of circumstances in which they might not be afforded as sweeping relief as they would like. *Kugler* v. *Helfant,* 421 U.S. 117 at 124-25, 44 L.Ed.2d 15 at 24-25, 95 S.Ct. 1524 (1975).

Quite clearly the state trial court had the power to quash the attachment on the basis that it was unconstitutional, and state procedures provided the means for the plaintiffs to obtain this relief. Appellees, themselves, do not dispute this. Immediately upon being served with the writ of attachment and complaint, appellees could have filed a motion to quash the attachment on the grounds that it violated their due process rights.[4]

Technically speaking, as appellees point out (appellees' brief, p. 27), a state trial court declaration that the attachment violated their due process rights would protect appellees only as to the single attachment in question and would not protect the appellees' class. However, to construe this technicality as rendering appellees' state court remedy inadequate requires the Court to *assume* bad faith on the part of state officials and the state court—something which this Court expressly refused to do in *Huffman.* 420 U.S. at 611, 43 L.Ed.2d at 496. As a matter of practice, state

[4] Illinois Supreme Court Rule (Ill. S.C.R.) 184, discussed more fully at point III, *infra,* provides that a party may file and call up a motion for disposition at any time. Illinois Supreme Court Rules are made applicable to attachment proceeding pursuant to the express provisions of the Illinois Attachment Act (§26) (A. 43).



officials and the state court, in accord with their constitutional responsibilities, abide by a declaration of unconstitutionality, subject to appeal. Such an appeal, which would go directly to the Illinois Supreme Court[5], would provide a speedy resolution of the issue, legally binding on all state courts.

Moreover, to accept appellees' technical objections would wholly undercut *Huffman* and *Younger,* since the same objections could have been urged in those cases. Defense of the state suits in those cases would not have removed the threat of future state suits in those cases either. The state suit in the instant case gave the appellees an opportunity to get far more protection than was available in *Younger* and *Huffman,* because appellees could have filed a third party complaint against at least the Sheriff and Clerk of Cook County[6]. Presumably, this course would not have been available in *Younger* and *Huffman* since those actions were criminal and quasi-criminal in nature.

The appellees' contention that their defense of the state suit could not afford adequate protection to the appellees' class and that, therefore, it was proper for the district court to exercise its jurisdiction in this case (appellees'

[5] Illinois Supreme Court Rule 302(a) provides for direct appeals when a state statute is held invalid.

[6] As appellees point out, the intricacies of class actions are not settled in Illinois. Plaintiff and defendant class actions are, however, permissible, and there is no bar to maintaining such a suit as a third party suit. Appellees' contention that defendant class actions are not allowed is refuted by practice in the Illinois courts and one of the cases cited by appellees. *Gaffney* v. *Shell Oil Co.,* 19 Ill.App.3d 987, 312 N.E.2d 753 (1974). In any event, the lack of clarity of the law in Illinois is just another reason for the federal courts to defer to the state courts.

brief, pp. 29-30) is a bootstrap argument. When they brought their federal suit the named appellees were engaged in a pending state court proceeding and had an adequate remedy available there. Thus, the district court should have deferred to the state court immediately. Appellees are attempting to argue that by naming a class they enhanced their own standing to be in the federal courts, and thereby avoided *Younger* and *Huffman*. Such a theory seems a clear violation of class action principles since the named appellees could not have maintained their suit under *Younger* and *Huffman* without naming a class and the appellees' class could not have maintained a suit without the named appellees. *See Sosna* v. *Iowa*, 419 U.S. 393 at 402-403, 42 L.Ed.2d 532 at 542, 95 S.Ct. 553 (1975); *O'Shea* v. *Littleton*, 414 U.S. 488 at 494, 38 L.Ed.2d 674 at 682, 94 S.Ct. 669 (1974).

The adequacy, effectiveness and speed of appellees' state court remedy can be amply demonstrated. The attachment suit against appellees was instituted on October 30, 1974, and appellees were served with the writ and complaint on November 5th. The hearing on that attachment was scheduled to come before the court no later than December 19, 1974—nearly a full year before the district court's judgment in this case. At that hearing appellees could have attacked the attachments on constitutional or any other grounds.[7]

Assuming that the Illinois Act is as patently violative of appellees' rights as they assert, the Circuit Court of Cook

[7] As indicated at note 1, *supra*, and explored more fully in point III, *infra*, appellees had the right to call for an immediate hearing on a motion to quash the attachment. Ill. S.C.R. 184.



County—a court not known for its conservatism in such matters—would surely have sustained an attack on the statute and entered an order quashing the attachment. The State would then, as is its custom in all cases where one of its statutes has been held unconstitutional, have sought an immediate appeal. Such an appeal would be available either pursuant to Illinois Supreme Court Rule 308 (interlocutory appeals)[8] or, as appellees point out (appellees' brief, pp. 32-33), pursuant to Illinois Supreme Court Rule 304 (appeals from final judgments as to fewer than all claims).[9] As is invariably the case where a statute has been held unconstitutional, the request for an interlocutory appeal (Ill. S.C.R. 308) or the request that the trial court declare its order final and appealable (Ill. S.C.R. 304) would be granted. Under either procedure the trial court could, and in all

[8] Illinois Supreme Court Rule 308 in relevant part provides:

(a) *Requests.* When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order.

[9] Contrary to the assertion in appellees' brief (pp. 32-33), appeals from ruling on matters relating to attachment are not limited to the procedure provided by Illinois Supreme Court Rule 304. The case upon which appellees rely in making this assertion (*Smith* v. *Hodge*, 13 Ill.2d 197, 148 N.E.2d 793 (1959)) holds only that an order quashing an attachment is not a final appealable order. Section 26 (A. 43) of the Illinois Attachment Act specifically makes all Illinois Supreme Court Rules applicable to attachment cases, and Section 40 (A. 48) provides for appeal as in other civil cases.

probability would, stay further proceedings on the underlying debt claim.

Once the appeal was allowed, it would go directly to the Illinois Supreme Court pursuant to Illinois Supreme Court Rule 302(a), which provides for direct appeals to that court where a state statute has been held invalid. If the appeal were an interlocutory one, the State's brief would be due in 35 days, the appellees' brief due 35 days later and the reply brief due 14 days after that. Ill. S.C.R. 308(d), 343(a). Argument before the court would in the usual case come at the next session of the court, which holds sessions every two months beginning in January, with the exception of July and August. The court's opinion could be expected within two to four months. The above schedule assumes the usual case and not one in which a state statute has been held unconstitutional. In such a case an accelerated briefing and argument schedule may well be imposed either at the instance of the parties or on the court's own motion.

While the above scenario is necessarily speculative, it is certainly less strained than that which the appellees advance (appellees' brief, pp. 32-35). It is also based upon Illinois practice experience and not on imagination. This is clearly evident from the procedural course followed in a case recently decided by the Illinois Supreme Court. In *First Finance Co.* v. *Pellum,* 62 Ill.2d 86, 338 N.E.2d 876 (1975) a judgment creditor instituted a wage deduction proceeding (Ill. Rev. Stat. 1973, ch. 62, §71 et seq.) against its debtor's employer—the State of Illinois. Under the procedure provided for wage deductions, which is similar to that under the Illinois Attachment Act, the creditor instituted his suit by filing an affidavit for a wage deduction on December 20, 1974, and set a return date of February 26,



1975. The State, as garnishee, filed a motion to quash the wage deduction summons and to dismiss the case on the basis that the State was immune from garnishment, and called the matter for hearing on February 13th. The State's motion was denied on March 10th. The State then requested permission to take an interlocutory appeal (Ill. S.C.R. 308), which was granted, and thereafter, requested the Illinois Supreme Court to allow a direct appeal on the grounds that the public interest required an expeditious determination. Ill. S.C.R. 308(b). The court allowed the appeal as a matter of its discretion[10] and ordered an accelerated briefing schedule. The case was argued in a special June session of the court and the court's opinion was filed on September 26, 1975—only ten months after the suit was filed in the trial court. This is to be compared to the 13½ month period between the State's filing its attachment complaint in this case on October 30, 1974, and the district court's judgment on December 15, 1975.

Assuming that the Illinois trial court were to uphold the Illinois Act and deny a motion to quash the attachment, then appellees could have followed the same interlocutory appeal route outlined above, except that a direct appeal to the Illinois Supreme Court would have been discretionary, as in the *First Finance* case.

If an interlocutory appeal were denied and the trial court refused to declare its order final and appealable—a highly unlikely event where the validity of a state statute is involved—an appeal would have to await a final judgment

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10 In the instant case, the appeal would be as a matter of right Ill. S.C.R. 302(a).

order after adjudication of the underlying debt claim. Assuming that appellees lost on the merits of this claim, an appeal would lie directly to the Illinois Supreme Court if the attachment provision of the Illinois Act had been found unconstitutional and as a matter of discretion if the attachment provisions upheld. The case would not be moot, as appellees assert (appellees' brief, p. 33) because a stay of enforcement of the judgment could be obtained pursuant to Illinois Supreme Court Rule 305. If the appellees prevailed on the merits, an appeal of the attachment issue would still lie under an exception to the usual rule of mootness. In Illinois a case will not be dismissed on appeal for mootness if an issue of substantial public interest is presented. In determining the existence of a public interest question in a particular case, courts will consider the public or private nature of the issue presented, the likelihood of recurrence of the issue, and the desirability of an authoritative determination for the future guidance of public officers. *People ex rel. Wallace* v. *Labrenz,* 411 Ill. 618, 622, 104 N.E.2d 769 (1952); *Save-At Builders Products Co.* v. *American Federation of State, County and Municipal Employees,* 13 Ill.App.3d 846, 301 N.E.2d 67 (1973); *Kern* v. *Chicago & Eastern Illinois R.R. Co.,* 44 Ill.App.2d 468, 195 N.E.2d 197 (1963). Clearly, the instant case falls within this exception.

It is, therefore, submitted that appellees had a speedy and effective state court remedy which would have adequately protected their federal rights and the district court should have declined jurisdiction for this reason.



C.

**An Attachment Action Is A Proceeding In The State Court.**

Whatever the vitality of the 4-3 decisions in *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972) and *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 31 L. Ed. 2d 424, 92 S.Ct. 1113 (1972), those cases are clearly inapposite here. As the district court found, Illinois attachment proceedings are "proceedings in a state court" (A. 70.[11] They are not, as appellees assert (appellees' brief, p. 35-42), extrajudicial proceedings.

Under the Illinois Act, attachment is one means of commencing a suit against a debtor on some contract or tort claim. In the case of a tort claim there is direct judicial participation in the proceeding prior to the attachment, since the creditor must appear before a judge to be examined on his cause of action before a writ of attachment will issue (§ 2) (A. 29-30). In contract actions the creditor must apply to the clerk of the court, who is an officer of the court, for the writ. The writ is executed upon the property to be attached by the sheriff (§ 8) (A. 35). The attachment itself, separate and apart from the underlying claim, is a *suit* against property whereby the court obtains *in rem* jurisdiction upon the execution of the writ. *Field* v. *Shoop,* 6 Ill. App. 445 (1880). It is thus evident that an attachment is a proceeding in a state court from its inception and cannot in any sense be characterized as extrajudicial once the property is attached.

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[11] The appellees have not taken a cross-appeal in this case, and thus have questionable standing to contest the district court's judgment in this or any other regard. *United States* v. *Yorfine,* 412 F.2d 329 (5th Cir. 1969).

Service of the writ upon the debtor confers *in personam* jurisdiction upon the court (§ 10) (A. 35) and the debtor may immediately move the court to quash the attachment (§ 27) (A. 44); Ill. S.C.R. 184. Thus, the court's continuing participation in the attachment proceeding is obvious.

The sheriff, as an officer of the court (or the garnishee in the case of garnishment), holds the attached property subject to the control of the court (§§ 14, 21) (A. 38, 41). If the debtor prevails on the underlying claim or has the attachment quashed, the sheriff must, pursuant to the court's judgment, return the property to the debtor. If the creditor prevails, the sheriff continues to hold the property until the creditor executes upon the judgment as in any civil case (§§ 34, 36) (A. 46, 47). The attached property is *under the control of the court* from the time it is attached. *Benjamin Harrison & Co.* v. *Western Smelting & Refining Co.*, 322 Ill. App. 609, 54 N.E. 2d 900 (1944).

The Illinois proceeding is thus totally unlike that in *Fuentes* where the creditor obtained possession of the property in an extrajudicial proceeding or that in *Lynch* where there was a total lack of court supervision and the state officials were acting as agents of the creditor. This Court in *Lynch* specifically noted that the statute in that case was one of the few state statutes which allowed garnishment without any participation by the court, and that a debtor had minimal opportunity for relief from the garnishment at best. 405 U.S. at 555, 31 L.Ed.2d at 436. In Illinois the court has jurisdiction and complete control over the attached property from the instant it is attached. The sheriff holds the property under the court's supervision both for the benefit of the creditor and debtor.



*Gerstein* v. *Pugh*, 420 U.S. 103, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975) has no application to the present case for the same reasons that *Lynch* and *Fuentes* do not. Plaintiffs in *Gerstein* were being held in custody merely on a prosecutor's information without judicial participation of any kind and without the right to a judicial hearing. Plaintiffs there brought suit in the federal court claiming a right to a judicial hearing. In other words, the federal suit in *Gerstein* could not have interfered with a pending state court proceeding in any manner since none existed. The federal suit in *Gerstein* was brought to compel state officials to bring a state court proceeding, and not as in this case to cut short the pending state court proceeding.

## III.

## THE PROCEDURES PROVIDED IN THE ILLINOIS ATTACHMENT ACT COMPORT WITH DUE PROCESS OF LAW.

The district court and the appellees focus on three alleged deficiencies in the Illinois Act which they assert render it unconstitutional: 1) that the Act does not require the creditor to set out specific facts in his affidavit for attachment, but authorizes the writ to issue upon conclusory allegations; 2) that the creditor need not present his affidavit to a judge before the writ will issue, but only to a clerk; and 3) that the Act does not provide for an immediate post-seizure hearing for the debtor (court's opinion, A. 76-77; appellees' brief, pp. 50-51). It is evident from the above that the court reached its conclusion as to the unconstitutionality of the Illinois Act by a mechanical application of *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 40 L. Ed.2d 406, 94 S.Ct. 1895 (1974), rather than following the admonition of *Mitchell* that there is no strict rule as to the

requirements of due process. Nevertheless, it is helpful to explore the three requirements of due process which the district court found the Illinois Act lacked for the purpose of demonstrating the validity of the Act.

First, the conclusion that the Act is deficient because it does not require that specific facts be alleged prior to attachment is obviously without foundation. A comparison between *Mitchell* and the present case easily establishes this. In *Mitchell,* the creditor alleged the sale of certain items to the debtor, that the unpaid purchase price of the items was overdue, and that demand therefore had been made. The creditor also merely alleged that he had reason to believe the debtor would dispose of the items, absent sequestration. 416 U.S. at 601-02, 40 L.Ed.2d at 410. In the instant case the appellants alleged that appellees Juan and Maria Hernandez applied for public aid while concealing monies on deposit in their credit union account, and that as a result of that concealment, appellants were obliged to provide public assistance in the sum of $3,720.20 to which appellees were not entitled.[12] Clearly, the facts alleged in the present case are just as specific as the facts alleged in *Mitchell.* Both allege facts revealing the basis of the debt. Additionally, the factual allegations in the present case support the grounds for attachment—fraudulent concealment of property. The creditor in *Mitchell* failed to support his assertion that the debtor would dispose of the property absent sequestration by any factual allegations. There-

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12 These facts were alleged in the complaint (A. 14-16) and not the affidavit for attachment (A. 17-19). However, an examination of the affidavit reveals that the complaint is incorporated therein and that the affidavit can only be used on this basis (A. 17). The facts in both documents are sworn to.



fore it can be plainly seen that there is no basis for the district court's finding that allegations supporting the attachment in this case were too conclusory.

Second, the court concluded that the Illinois Act was defective because the creditor need not present his affidavit to a judge. At the outset it must be pointed out that this conclusion is erroneous as to tort claims. In tort actions the creditor must apply to a judge and "be examined, under oath, by such judge concerning the cause of action" (§2, A. 29-30). The district court's conclusion that in tort cases the judge's inquiry is limited to the amount of damages is at direct odds with this provision of the Act and is unsupported in the record. Thus, at least as to tort claims the district court was clearly incorrect in finding the Act unconstitutional and at a minimum should be reversed as to tort claims brought under the Illinois Act.

It is true, however, that with contract claims the creditor need not go before a judge to obtain an attachment. It is appellants' position that this is not a defect significant enough to render the Act unconstitutional. The function of a preattachment, ex parte appearance before a judge is necessarily limited to ensuring that the creditor's claim is legally sufficient. The creditor who would abuse the attachment process by lying in his affidavit would lie just as readily before a judge. The debtor finds security from abuse of the process via a post-seizure hearing and/or the creditor's bond. The likelihood of an attorney for a creditor pleading a legally insufficient contract case is so slight as to be insignificant. As this Court noted in *Mitchell* (416 U.S. at 609, 40 L.Ed.2d at 415):

> These are ordinarily uncomplicated matters that lend themselves to documentary proof; and we think it

> comports with due process to permit the initial seizure on sworn ex parte documents, followed by the early opportunity to put the creditor to his proof.

Third, the court's conclusion that the Act does not provide for an immediate post-seizure hearing is true only in the sense that the Act does not expressly so provide. It does provide for a timely hearing within 10 to 60 days of the attachment (§§6, 25) (A. 33-34, 43). More importantly, it provides that the Illinois Civil Practice Act and Supreme Court Rules apply to attachment proceedings (§26) (A. 43). Illinois Supreme Court Rule 184 provides:

> No provision in these rules or in the Civil Practice Act prescribing a period for filing a motion requires that the motion be heard within that period. Either party may call up the motion for disposition before or after the expiration of the filing period.

This provision is regularly employed in practice before the Illinois courts. While the Illinois Attorney General's office has no experience in quashing attachments, this office has on numerous occasions in the past quashed garnishments against the State. Under provisions of the garnishment act (Ill. Rev. Stat. 1973, ch. 62, §71 et seq.) a garnishment summons is returnable not less than 60 nor more than 70 days after issuance. This office routinely filed motions to quash, set a hearing thereon, and had the garnishment quashed before the return date.

Appellees alleged in their complaint and later supported by affidavit that they appeared in the state court on November 19, 1974, the first return date of the attachment, and demanded an immediate hearing and that they were informed that the matter had been continued (A. 10, 25). They do not state, however, that they appeared to present



a motion to quash or whether they appeared during motion call, when such a motion would be considered. Their allegation is so vague that it is impossible to draw an inference from it that a debtor cannot employ Supreme Court Rule 184 to gain an immediate hearing on the attachment. To the extent that their allegation casts any doubt on the immediate availability of a hearing on the attachment under Illinois law, another reason is presented why the district court should not have interferred with the pending state court attachment proceeding. The state courts should have been left with the opportunity to interpret Illinois law.

The above mechanical analysis establishes that the Illinois Act comports with due process since it affords the safeguards similar to those present in *Mitchell.* Appellants presented a more functional analysis of the Act, as is required by *Mitchell,* in their original brief, which need not be restated here. One point should be reemphasized however. The Illinois Act is very narrowly drawn, encompassing only those situations where the threat to the security of the creditor is great, indeed. This fact, which was not present in *Mitchell,* must be weighed in the balance.

## CONCLUSION

For the foregoing reasons, appellants respectfully request that this Honorable Court vacate the judgment of the district court, because that court failed to defer to the Illinois state court for a resolution of the due process issue presented in a pending state attachment proceeding.

In the alternative, appellants request that the district court's judgment be reversed on the basis that the procedures prescribed by the Illinois Attachment Act comport with principles of due process.

Respectfully submitted,

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January 14, 1977

FOR ARGUMENT

FILED
JAN 11 1977

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1407

JAMES TRAINOR, et al.,

*Appellants,*

vs.

JUAN HERNANDEZ, et al.,

*Appellees.*

## REPLY BRIEF FOR APPELLEES MORGAN M. FINLEY AND RICHARD J. ELROD

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---

## REPLY BRIEF FOR APPELLEES MORGAN M. FINLEY AND RICHARD J. ELROD

---

### QUESTIONS PRESENTED

**Did Appellees Finley And Elrod Perfect Their Appeal, And May The Supreme Court Review The Action Taken By The Three Judge District Court?**

**II.**

**Should Have The Three Judge Court Abstained From Hearing This Case On The Merits?**

**III.**

**Do The Statutory Procedures Provided In The Illinois Attachment Act, Ill. Rev. Stat., 1973, Ch. 11, Afford These Plaintiffs Due Process Of Law?**

## ARGUMENT

### APPELLEES FINLEY AND ELROD HAVE PERFECTED THEIR APPEAL TO THE SUPREME COURT AND MAY CHALLENGE THE ACTION TAKEN BY THE THREE JUDGE COURT.

The Three Judge District Court for the Northern District of Illinois, Eastern Division, entered its judgment and final order on December 15, 1975, which judgment basically granted the relief requested by the plaintiffs. The Motion to Stay the Injunction was denied on February 25, 1976. Finley and Elrod timely filed their Notice of Appeal on February 10, 1976.[1] The appeal was perfected when the case was docketed with the Clerk of the Supreme Court. Appellee Hernandez argues that Finley and Elrod have not perfected their appeal and he has moved for dismissal of their appeal.

At the outset it should be noted that the requirements necessary to perfect an appeal are contained in Supreme Court Rule 10(1).[2] There is no doubt that Finley and Elrod timely filed their Notice of Appeal. Co-defendants Trainor and O'Malley acted to docket the case; therefore, these defendants had no cause to do so. However, plaintiff-appellee Hernandez makes much of the fact that Finley and Elrod did not file a separate jurisdictional state-

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1. Not May 10, 1975, as incorrectly stated in their earlier Brief (p. 2).

2. Supreme Court 10(1): An appeal permitted by law to this Court shall be taken by filing notice of appeal, in the form and at the place prescribed by this Rule, and shall be perfected by docketing the case in this Court as provided in Rule 13.



men. Presumably in a case where there are a dozen defendants, Hernandez believes that a dozen jurisdictional statements must be filed. A careful reading of this Court's Rules fails to disclose such a requirement of multiple jurisdictional statements. Explicitly to the contrary is Rule 10(4), which makes all parties to the proceeding below parties to the appeal unless some parties affirmatively act to opt out. There can be no mistaking Finley and Elrod's intentions to remain in this appeal. The only genuine controversy is whether or not they have properly designated themselves as appellees supporting the position of appellants. Even if it is decided that this constitutes a misnomer, it has no effect on this Court's jurisdiction to hear their appeal.

The cases cited by Hernandez are wholly inapposite to the instant situation. *Shapiro* v. *Doe,* 396 U.S. 488 (1970) involved an appeal wherein the sole defendant-appellant failed to timely file a jurisdictional statement. That holding is of no precedential value in determining whether multiple jurisdictional statements are required in the same appeal. Plaintiffs' assertion[3] that Finley and Elrod have not appealed the lower court's decision is without basis in fact and in law. *Swarb* v. *Lennox,* 405 U.S. 191 (1972) is therefore inapposite.

Rule 15(3) allows for a single jurisdictional statement where several related cases are appealed from the same court which involved similar questions on review. To require co-defendants in the same case to do that which is not required in different cases is manifestly contrary to the intent of the rules when considered individually or in *pari materia.* The plaintiffs' Motion to Dismiss the Appeal of defendants Finley and Elrod should be denied.

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3. Hernandez Brief, p. 16, fn. 5

## II.

## THE THREE JUDGE DISTRICT COURT SHOULD HAVE ABSTAINED FROM HEARING THIS CASE ON THE MERITS.

It is no simple coincidence that the Supreme Court came to hear the major garnishment-type cases by way of review from state court rulings. *Snidach* v. *Family Finance Corporation,* 395 U.S. 337 (1969) came to this Court after the federal constitutional challenges had been heard in the Wisconsin County, Circuit and Supreme Courts. *Mitchell* v. *W. T. Grant,* 416 U.S. 600 (1974) was heard in the New Orleans City Court and the Supreme Court of Louisiana. It came to this Court by Writ of Certiorari to the State Supreme Court. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 95 S. Ct. 719 (1975) raised the constitutional issues before the Superior Court of Whitfield County and the Supreme Court of Georgia before this Court became involved. The maverick of the lot was *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) where, as here, a three judge District Court became involved in ruling on constitutional challenges to pre-judgment replevin statutes. Justices Powell, Rehnquist, and, of course, Stevens, took no part in that decision. Mr. Justice White, the Chief Justice, and Justice Blackmun, each dissented. They did so, not on the issues raised by the merits, but for the reason that the three judge District Court should have reconsidered their actions in light of *Younger* v. *Harris,* 401 U.S. 37 (1971),[4] *Samuels* v. *Mackell,* 401 U.S. 37 (1971),

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4. *Younger* had been decided only the previous term (1971) to *Fuentes.*



*Boyle* v. *Landry,* 401 U.S. 77 (1971), and *Perez* v. *Ledesman,* 401 U.S. 82 (1971). *Fuentes* was, as in the instant case, a frontal attack on state civil statutes made in Federal Court. The *Fuentes* dissenters anticipated the decision in *Huffman* v. *Pursue,* 420 U.S. 592 (1975) by three years and obviously did not think that *Younger* was limited to criminal or even civil statutes in aid of a criminal law, as *Fuentes* was neither. It was strictly civil.

The well acknowledged purposes to be served by federal abstention need only be summarized as comity and federalism.[5] However, an ancillary, but no less important consideration, in a suit seeking declaratory and injunctive relief, is the necessity to adequately plead the threat of irreparable injury which is both great and immediate. *Fenner* v. *Boykin,* 271 U.S. 240 (1926) and *Younger, supra.* The complaint seeks class relief, but wholly fails to adequately plead the existence of irreparable injury which is both great and immediate.[6] The plaintiffs purport to meet this threshold requirement by asserting that the facts relative to Hernandez' illness constitute irreparable injury. This falls far short of the test. However, assuming, *arguendo,* that it is sufficient for Hernandez, those facts cannot bootstrap the plaintiff class past the threshold requirements as said facts pertain solely to plaintiff Hernandez. The plaintiff class, therefore, has failed to plead or otherwise prove any irreparable injury, much less that which is great and immediate. Class relief was, therefore, erroneously granted.

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5. See *Huffman* and *Younger,* at p. 44.

6. The complaint, p. 19, contains mere conclusory allegations.

The narrow exception to the *Younger* and *Huffman* doctrines is in the situation where the challenged statute is "flagrant and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to appeal it.'"[7] Facial invalidity is expressly insufficient.[8] The three judge Court applied the incorrect test and found mere facial invalidity. That error alone is grounds for reversal.

The flagrantly and patently violative test assumes, *inter linea,* the impossibility of narrowing the statute by state court interpretation. Unfortunately, this Court does not have the benefit of state court decisions dealing with these constitutional challenges. The Illinois Supreme Court could hold that the hearing date on attachments[9] must be within ten (10) days. It could hold that the present period is appropriate, but that the defendant must be permitted a hearing, on motion, at any time after the attachment. The State Supreme Court could require specific factual allegations and find that filing general denials by the defendant must trigger an immediate hearing on the merits. The state court could do many things to limit or construe the statute, but this Court is left to speculate what might be done because the state courts were preemptorily denied the opportunity to do anything by the Federal District Court's actions.

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7. *Younger, supra,* at pp. 53-54.

8. *Huffman* and *Younger, supra.*

9. Ten (10) to sixty (60) days after the attachment, Ch. 11, § 6, Illinois Revised Statutes (1973).



Comparing these facts before the Court with those considerations in the case of *Mitchell* v. *W. T. Grant,* 416 U.S. 600 (1974), the Illinois Attachment Act is not constitutionally infirm or, at the very least, is not ripe for constitutional adjudication. *Snidach, supra,* involved a special type of property—wages. The Court found the leverage of the creditor on the wage-earner to be unconscionable. That condition is not present in the case at bar. The *Fuentes* and *Mitchell* cases demonstrated this Court's belief that conclusory assertions of entitlement to possession constitute an insufficient showing. The Illinois Attachment Act, however, sets forth only nine specific situations wherein a Writ of Attachment may be granted.

Judicial review of an application must be sought in tort cases but the District Court found that fact to be uncontrolling.[10] These defendants urge the position taken by Justice Powell in his concurring opinion in *North Georgia Finishing, Inc., supra,* which stated the petition need only be presented to a neutral officer, not necessarily a judicial officer, to determine a factual basis for the need to resort to the sought-after remedy. He concluded that it would be sufficient for a clerk or other officer of the court to issue the original writ.[11] Justices Blackmun and Rehnquist in their *North Georgia Finishing, Inc.* dissent agreed that "the clerk-judge distinction, relied on by the Court, surely is of little significance so long as the court officer is not an agent of the creditor." Justices Stewart, Douglas and Marshall in their *Mitchell* dissent, also felt

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10. The District Court declared even those sections requiring judicial review to be unconstitutional.

11. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* concurring opinion, Justice Powell, fn. 3.

that the fact that the official who signs the ex parte application is a judge instead of a court clerk, is of no constitutional significance. They correctly pointed out that he can do no more than ascertain the formal sufficiency of the allegations and that the act of issuing the writ thereafter becomes ministerial.

The necessity in Illinois, or lack thereof, for pleading specific facts demonstrating the right to possession is unknown to this Court, as the Illinois Supreme Court has been precluded from making that determination. As in *Mitchell,* a bond is required to be filed by the plaintiff in Illinois, the defendants' costs are awarded pursuant to Section 27 for a wrongful attachment, and Section 30 of the Act allows the defendant to file a counter-claim for damages. The Sheriff maintains possession of the attached property and pending disposition pursuant to Section 14, and the garnishee maintains control of funds pursuant to Section 21.

The necessity of protecting creditors of easily wasted property is amply explained in the *Mitchell* opinion. There is no asset anywhere to be found which is easier to convert, waste or secrete than cash. Requiring notice to be given prior to seizure in such a circumstance as this would be the height of folly. The money could be easily withdrawn and spent, or hidden. In cases involving purported indigence, the funds would be forever lost to the creditor.



## III.

## THE STATUTORY PROCEDURES PROVIDED IN THE ILLINOIS ATTACHMENT ACT, ILL. REV. STAT., 1973, CH. 11, AFFORD THESE PLAINTIFFS DUE PROCESS OF LAW.

The defendants Finley and Elrod adopt by reference the arguments made by defendants Trainor and O'Malley concerning the constitutionality of the Illinois Attachment Act and adopt those arguments as their own.

## CONCLUSION

The defendants Finley and Elrod have properly preserved all issues raised on appeal for their appeal. They timely filed their notice of appeal and are parties to this appeal under this Court's Rules. There is no requirement in any court rule or decision which mandates that these defendants file a duplicative jurisdictional statement. Their appeal was perfected when the case was docketed. Plaintiffs' motion to dismiss their appeal should be denied.

The plaintiff class has never asserted a single fact in support of its purported irreparable injuries. This Court is left to speculate what they might be. The rule of equity is that this case should have been dismissed pursuant to *Fenner* v. *Boykin, supra.* Failing that, the District Court should have abstained from hearing this controversy pending a resolution in State Court of the constitutional issues. Those issues might well become moot, or resolved, to the satisfaction of the plaintiff, thereby saving the District Court from making unnecessary rulings on matters which are of special state concern. It would also have

made it unnecessary to interfere with lawfully enacted State statutes. Comity and Federalism were ill-served in this case. The sole conclusion to be drawn from the District Court's actions is that it considered itself better suited than the Illinois State Courts to protect the constitutional rights of the citizens of Illinois. That determination was unwarranted and should be rejected by this Court with an opinion and order reversing the District Court.

Respectfully submitted,

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